No. 74-548

In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
NOV 6 1974
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE
STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

MARK L. EVANS,
Assistant to the Solicitor General,

BENNET N. HOLLANDER,
RICHARD FARBER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions, statutes, and regulation involved	2
Questions presented	2
Statement	3
The questions are substantial	9
Conclusion	18
Appendix A	1a
Appendix B	37a
Appendix C	39a
Appendix D	41a
Appendix E	62a
Appendix F	65a

CITATIONS

Cases:

California v. *LaRue*, 409 U.S. 109	18
Department of Revenue v. *James B. Beam Distilling Co.*, 377 U.S. 341	14
First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 339	9, 12
Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324	14, 18
Johnson v. *Maryland*, 254 U.S. 51	17

Cases—Continued

	Page
Leslie Miller, Inc. v. *Arkansas*, 352 U.S. 187	17
McCulloch v. *Maryland*, 4 Wheat. 316	14
Moses Lake Homes, Inc. v. *Grant County*, 365 U.S. 744	15
Paul v. *United States*, 371 U.S. 245	13, 17
Penn Dairies, Inc. v. *Milk Control Commission*, 318 U.S. 261	17
Public Utilities Commission v. *United States*, 355 U.S. 534	17
Spector Motor Service v. *O'Connor*, 340 U.S. 602	14
Standard Oil Co. v. *Johnson*, 316 U.S. 481	13
United States v. *State Tax Commission of the State of Mississippi*, 412 U.S. 363	3

Constitutional provisions, statutes, and regulations:

United States Constitution:	
Article I, Section 8	15, 65a
Article IV, Section 3	65a
Article VI	15, 65a-66a
Twenty-first Amendment	9, 14, 18, 66a
Buck Act, 61 Stat. 643, *et seq.*, 4 U.S.C. 105-111	2, 6-7
Sec. 105(a)	7, 15, 66a
Sec. 107(a)	7, 13, 66a-67a
Section 110	67a
5 U.S.C. 2105(c)	13
28 U.S.C. 2281	5

Constitutional provisions, statutes, and regulations—Continued

50 U.S.C. App. 473	15
3A Miss. Code 1942 Ann. 4153	4
3A Miss. Code 1942 Ann. 4154	4
Mississippi Local Option Alcoholic Beverage Control Law, 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-01, *et seq.*	2, 3
Section 10265-18(c)	3, 67a-68a
Section 10265-106	4, 68a
Section 10265-112	5
32 C.F.R. 261.4(c)(1)	16
Mississippi State Tax Commission Regulation 25	2, 10, 12, 68a-69a

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE
STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, pp. 1a-36a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. B, *infra*, pp. 37a-38a) was entered on July 12, 1974. A notice of appeal to this Court (App.

C, *infra*, pp. 39a-40a) was filed on August 8, 1974. On October 1, 1974, Mr. Justice Powell extended the time for docketing the appeal to and including November 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

The relevant provisions of the United States Constitution, the Buck Act, the Mississippi Local Option Alcoholic Beverage Control Law, and Regulation 25 of the Mississippi State Tax Commission are set forth in App. F, *infra*, pp. 65a-69a.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect a "wholesale markup" on liquor sold to military officers' clubs and other nonappropriated fund activities located on military bases within Mississippi and to remit this "markup" to the Tax Commission. The questions presented are:

1. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

2. Whether the consent of the United States under the Buck Act to the imposition of state sales taxes on sales occurring within exclusively federal enclaves is inapplicable under the terms of that Act because

Mississippi's tax is imposed upon instrumentalities of the United States.

3. Whether the regulation is invalid because it conflicts with federal procurement regulations and policies.

STATEMENT

This case is here for the second time. It presents important legal issues that this Court found it unnecessary to resolve in the prior appeal in *United States* v. *State Tax Commission of the State of Mississippi*, 412 U.S. 363.

The material facts are not in dispute.[1] Prior to 1966, Mississippi prohibited the sale or possession of alcoholic beverages. In that year, it adopted a local option alcoholic beverage control law which provides that the State Tax Commission is the sole importer and wholesaler of alcoholic beverages. 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-01, *et seq.* The Commission is authorized to sell to retailers in the state "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-18(c). The statute directs the Commission to add to the cost of alcoholic beverages a

[1] The case was submitted on a stipulation of facts (App. D, *infra*, pp. 41a-61a).

"markup" which in its judgment would be adequate to cover the cost of wholesaling, to provide a reasonable profit, and to render prices competitive with those in neighboring states. 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-106.

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. On direct purchases by such military facilities, the regulation requires that distillers collect and remit to the Commission the "usual wholesale markup" charged by the Commission on its own sales to retailers. During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine.

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from out-of-state distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. D, *infra*, p. 53a). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal enclaves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process there (3A Miss. Code 1942 Ann. 4153, 4154). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and

the State exercise concurrent jurisdiction (App. D, *infra*, p. 43a).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "markup" was improper. The military authorities also attempted to pay the amounts for the markup into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the markups on their military sales to the Commission, the distillers would be subject to criminal prosecution (see 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-112) and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (App. D, *infra*, pp. 53a-56a). To obtain liquor, therefore, the military facilities were required by the distillers to pay the markup. By July 31, 1971, $648,421.92 had been paid under protest to suppliers outside Mississippi for such markups (*id.* at 57a).

The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional, an injunction against its continued enforcement, and a judgment for the amount already paid for markups.

The three-judge district court, convened pursuant to 28 U.S.C. 2281, granted summary judgment against the government. It held that the constitutional grants of authority to Congress to establish and regulate military forces and to exercise juris-

diction over lands belonging to the United States "are diminished by the express prohibition of the Twenty-first Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (340 F. Supp. 903, 904). The court did not address the government's other contentions that the regulation imposes an unconstitutional tax upon federal instrumentalities and impermissibly interferes with federal procurement regulations and policy.

On direct appeal, this Court vacated the district court's judgment and remanded the case for further proceedings (412 U.S. 363). It held that "the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction" (*id.* at 368, fn. omitted). The Court declined to reach the issues that the district court did not address. "[W]e believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments" (*id.* at 381).[2]

[2] The Court also declined to rule on the State's contention that the United States has consented under the Buck Act, 4 U.S.C. 105-111, to the imposition of the "markup" tax on sales to military facilities on the two exclusive jurisdiction bases. "Having found that the District Court erred in the basis on which it did dispose of this case," this Court decided to leave "for determination by that court in the first instance on remand" the issues "[w]hether the markup should be treated as a tax on sales occurring within a federal area within the meaning of [4 U.S.C.] § 105(a), see also 4 U.S.C. § 110(b), and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves" (412 U.S. at 379).

On remand, the three-judge district court again entered a judgment dismissing the government's complaint (App. B, *infra*, pp. 37a-38a). It held, with respect to liquor sales by out-of-state distillers to military facilities on the exclusive federal enclaves, that the State's markup requirement is a "sales or use tax" to which the United States has consented under Section 105(a) of the Buck Act, 4 U.S.C. 105(a) (App. A, *infra*, p. 9a). Although it recognized that the State regulation by its own terms requires the out-of-state distiller "both to collect [the markup] from the military purchaser and pay it over to the State" (*id.* at 18a), the court ruled that the tax is not on an instrumentality of the United States within the meaning of the Buck Act's exception in 4 U.S.C. 107(a). It held that the "legal incidence" of the tax—which it defined as "the legally enforceable, unavoidable liability for nonpayment of the tax" (*ibid.*)—falls upon the distiller, because the distiller is free to absorb the economic burden of the markup and "[t]he purchaser-vendee is not le-

gally or otherwise obligated to the Commission or the State for payment of the markup" (*id.* at 21a).

The district court disposed of the government's constitutional tax immunity argument on the same ground: the markup is not an unconstitutional tax on federal instrumentalities, because the legal incidence of the tax falls on the distiller, not on the military purchasing facilities (*id.* at 27a).

Finally, the court held that, "[s]ince the markup applies prorata to all wholesale liquor transactions, it does not alter the [military] vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor procurement under 'the most advantageous contract, price and other factors considered'" (*id.* at 33a-34a). Although the State regulation "may reduce the military's profit margin from retail liquor sales," "[t]he slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment" (*id.* at 35a). Like its ruling on the tax issues, the court's decision on the military procurement issue rests on its view that, under the Mississippi regulation, "[o]nly the vendor, in his individual capacity, is subject to state control" (*ibid.*).[3]

[3] This aspect of the district court's opinion apparently applies only to the bases over which the United States and Mississippi exercise concurrent jurisdiction. The court believed that its resolution of the Buck Act issue with respect to the exclusively federal enclaves made it unnecessary to reach the military procurement issue as it affects those bases (App. A, *infra*, pp. 25a-26a, n. 21). But see note 8, *infra*.

THE QUESTIONS ARE SUBSTANTIAL

The district court erroneously decided substantial constitutional issues involving the proper accommodation of state authority under the Twenty-first Amendment, on the one hand, with government immunity from state taxation and federal control of military procurement, on the other hand. The resolution of these issues—left undecided by this Court in its prior opinion in this case—has significant practical importance not only in Mississippi, which by 1971 had already collected more than $648,000 pursuant to the contested regulation, but also in other states that might follow Mississippi's lead in attempting to regulate and tax the purchase of liquor by federal instrumentalities for sale in federal enclaves or on military bases.

1. The district court's error with respect to the federal tax immunity and Buck Act issues lies in its determination that the "legal incidence" of the State's tax falls on the out-of-state distiller and not on the military purchasing facility. That determination itself rests on a definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (App. A, *infra*, p. 18a)—which this Court rejected in *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, a decision that we believe controls the present case.

The Court there invalidated a Massachusetts sales tax as applied to purchases of tangible personal property by a national bank. One of the issues was

whether the statute imposed the sales tax upon the bank as a purchaser or upon its vendors. The state court had held, as the district court held in the present case, that "[t]he legal incidence of a tax [is] * * * determined by 'who is responsible * * * for payment to the state of the exaction" (229 N.E. 2d 245, 249) and that under that test the legal incidence of the tax fell upon the vendor, not the purchaser.

This Court rejected the state court's reliance upon legal liability as the test of legal incidence. "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).

Like the Mississippi regulation in this case, the Massachusetts statute required the vendor to add the tax to the sales price, collect it from the purchaser, and remit it to the State.[4] This Court accord-

[4] Mississippi's Regulation 25 provides that direct orders from military facilities "shall bear the usual wholesale mark-up," that "[t]he price of such alcoholic beverages shall be paid by such organizations directly to the distiller," and that the distiller "shall in turn remit the wholesale markup" to the State (App. F, *infra*, p. 69a). The State Tax Commission also informed alcoholic beverage suppliers by letter that "[t]he mark-up regulatory fee * * * must be invoiced to the Military and collected directly from the Military" and that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without * * * collecting said fee directly from the said Military organization shall be in violation" of the statute and regulation (App. D, *infra*, pp. 55a-56a).

ingly viewed the statute as establishing "a clear requirement that the sales tax be passed on to the purchaser" (*ibid.*). It rejected the state court's reasoning—embraced in substance by the district court in the present case—that "simply because there is no sanction against a vendor who refuses to pass on the tax * * *, this means the tax is on the vendor" (*id.* at 348).[5]

It is true that the Massachusetts statute, unlike the Mississippi regulation, prohibited vendors from advertising that they would absorb the sales tax. But that was not a decisive consideration in this Court's view of the case. What the Court considered "controlling" was that "the Massachusetts Legislature intended that this sales tax be passed on to the purchaser" (*ibid.*). "[I]t seems clear to us that the force of the law * * * is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written" (*ibid.*).

The legal incidence of Mississippi's wholesale markup, like Massachusetts' sales tax, falls on the purchaser, not the seller. The regulatory intent here is that the markup charge be passed on to the military

[5] The district court stated, in support of its conclusion that the legal incidence of the Mississippi tax is on the out-of-state distiller, that "[t]he vendor may fix the price at which he sells altogether free of any state control or restraint" and that "Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the markup's economic burden" (App. A, *infra*, pp. 20a, 21a). But see note 4, *supra*.

purchasing facility. Regulation 25, as construed by the Tax Commission itself in a letter to liquor suppliers, requires that "the mark-up regulatory fee * * * be invoiced to the Military and collected directly from the Military" (App. D, *infra*, pp. 55a-56a). Although the district court believed that no sanction would be imposed on a distiller who determined to absorb the markup rather than collect it from the military (App. A, *infra*, p. 21a), the same Tax Commission letter stated that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations * * * without * * * collecting [the markup] fee directly from the said Military organization shall be in violation" of the statute and regulation and therefore subject to criminal and civil sanctions (App. D, *infra*, p. 56a).

Moreover, had the district court been correct in its belief that no sanction would be imposed on a distiller for absorbing the markup, this Court's decision in *Agricultural Bank* makes clear that the absence of a sanction for a vendor's absorbing a tax does not mean that the tax is upon the vendor (392 U.S. at 348). It is the intention of the legislature, or, as here, the regulatory agency, that determines the legal incidence of the tax. The Tax Commission's intention, as reflected in its regulation and interpretive letters, is that the distillers should pass on the markup. As in *Agricultural Bank*, therefore, it is reasonable to assume that, "regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to [the regulation] as written" (*ibid.*). Indeed, it is unrealistic to think that the distillers voluntarily would absorb markups of 17 and 20 percent, which probably constitutes a major portion of their profit on the sales.

Since the legal incidence of Mississippi's markup falls on the military purchasers, and since, as the district court correctly recognized (App. A, *infra*, p. 9a), the purchasing facilities are instrumentalities of the United States,[6] it follows that the United States has *not* consented to the imposition of a tax with respect to such purchases by facilities on the exclusively federal enclaves. The Buck Act's consent to state taxation in federal areas is limited by Section 107(a) of that Act, 4 U.S.C. 107(a), which provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *." With respect to purchases by facilities on those bases, therefore, this Court's prior decision in the present case makes it clear that the markup is invalid. In the absence of consent to the tax, "nothing occurs within the State that gives it jurisdiction to regulate the * * * transaction" (412 U.S. at 371). There is thus no need to reach, with respect to the two federal enclaves, the constitutional tax immunity issue.

That issue must be reached, however, with respect to the two concurrent jurisdiction bases, because there the liquor is imported for delivery and use

---

[6] See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *Paul* v. *United States*, 371 U.S. 245, 261; 5 U.S.C. 2105(c).

within the jurisdiction of the State. As a tax on federal instrumentalities, the markup, in the absence of the Twenty-first Amendment, would be unconstitutional. The question is whether the Twenty-first Amendment was designed to abrogate the constitutional tax immunity doctrine so far as intoxicating liquor is concerned.

Federal tax immunity is "one of the cornerstones of our constitutional law" (*Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610)—"the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436). Nothing in the language of the Twenty-first Amendment or its history suggests any purpose to alter so fundamental an incident of federalism. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332. We submit that Mississippi's authority under the Amendment to regulate the transportation and use of alcoholic beverages within its jurisdiction does not extend so far as to permit it to impose a discriminatory tax on the federal government.[7]

[7] The tax is discriminatory because all other retailers in the State who are required to pay a markup receive storage, wholesaling, and delivery services from the Tax Commission in exchange. Indeed, as to them, the markup may not be a tax at all. The military facilities, however, receive no services whatsoever in return for the markup. Moreover, the tax favors the State over the federal instrumentalities by requiring the latter to pay 17 or 20 percent more for the same liquor that the State purchases from the same sources without any markup. The State may not, in the exercise of its power to tax, treat its own instrumentalities more favorably than those of the United States. See, *e.g.*, *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751.

2. The Mississippi regulation is also invalid under the Supremacy Clause of Article VI of the Constitution because it impermissibly interferes with the exclusive federal authority to regulate military procurement.[8] Article I, Section 8, of the Constitution gives Congress broad authority to "raise and support Armies," to "provide and maintain a Navy," and to regulate "the land and naval Forces." Pursuant to that authority, Congress has authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor on military bases (50 U.S.C. App. 473). The Secretary has accordingly promulgated regulations directing that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government

[8] This argument applies with respect to all four military bases in Mississippi. The district court declined to reach this issue with respect to the exclusive federal enclaves, because it erroneously concluded that consent to a tax under the Buck Act foreclosed an independent challenge to the tax as an unconstitutional interference with military procurement regulations (App. A, *infra*, pp. 25a-26a, n. 21). But 4 U.S.C. 105(a) provides only that "[n]o person shall be relieved from liability for payment of * * * any sales or use tax levied by any State, * * * *on the ground that the sale or use * * * occurred in whole or in part within a federal area*" (emphasis added). Its effect is only to place enclaves on an equal footing with concurrent jurisdiction bases for purposes of state sales taxes. The section does not preclude a challenge to a tax on some ground other than the one specified.

the most advantageous contract, price, and other factors considered" (32 C.F.R. 261.4(c)(1)).[9]

This policy of obtaining alcoholic beverages on the most favorable competitive terms possible is frustrated by Mississippi's regulation. The markup artificially inflates by 17 to 20 percent the price at which the military facilities could otherwise obtain their liquor. In effect, it sets a floating minimum price level which is 17 to 20 percent above the "most advantageous" price. In addition, the regulation has recently been interpreted by the Tax Commission to foreclose direct purchases of liquor from any out-of-state sources other than distillers.[10] This effort to

[9] Inexpensive liquor is one of several economic benefits for servicemen which are designed to make enlistment attractive and to maintain high morale and efficiency in the Armed Forces (App. D, *infra*, pp. 59a-60a). The profit from sales of alcoholic beverages supports the operation of officers' and non-commissioned officers' clubs, which "provide convenient facilities for off-duty dining, entertainment, relaxation and amusement" by Armed Forces personnel and their families and which therefore "contribute to the establishment and maintenance of Service morale and esprit de corps" (*id.* at 60a).

[10] The Tax Commission, in a memorandum dated August 8, 1973, addressed to "all vendors" and sent also to the military purchasing facilities, stated that the regulation permits military facilities to purchase liquor from the State or "direct from the *distiller*" (emphasis in original) and that "[p]urchases are not to be placed with any other source" (App. E, *infra*, p. 64a). The memorandum, together with the covering letter addressed to the military bases in the State, was introduced as an exhibit in the district court on remand. It would appear to preclude continuation of the military's practice of purchasing some alcoholic beverages, particularly imported liquors, directly from out-of-state *wholesalers*.

limit the military's sources of supply collides with the policies reflected in the procurement regulation.

Where a state price regulation conflicts with federal procurement policy, the state regulation must yield pursuant to the Supremacy Clause. Thus, in *Paul* v. *United States*, 371 U.S. 245, this Court invalidated California's minimum price regulation for milk as applied to purchases by military installations pursuant to the federal procurement law and regulations. See, also, *Public Utilities Commission* v. *United States*, 355 U.S. 534; *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Johnson* v. *Maryland*, 254 U.S. 51. Although the procurement regulation in *Paul* governed purchases by appropriated fund activities, whereas the regulation here governs purchases by nonappropriated fund activities, the language of the present regulation closely parallels the regulation at issue in *Paul* and reflects the same policy of requiring "active competition so that the United States may receive the most advantageous contract" (371 U.S. at 253).[11]

[11] *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see 318 U.S. at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). It was on this basis that the Court in *Paul* distinguished *Penn Dairies* (see 371 U.S. at 254-255).

Apart from the Twenty-first Amendment, therefore, the Supremacy Clause would bar Mississippi from applying its markup regulation to the alcoholic beverages purchased by the military installations. The Twenty-first Amendment does not require a contrary result. It was designed to confer on the states, by eliminating some of the potential Commerce Clause limitations, the power to regulate commerce with respect to alcoholic beverages. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329-331. It does not supersede "all other provisions of the United States Constitution in the area of liquor regulations" (*California* v. *LaRue*, 409 U.S. 109, 115). Nothing in its language or history suggests that it was intended to diminish congressional authority to regulate military affairs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MARK L. EVANS,
Assistant to the Solicitor General.

BENNET N. HOLLANDER,
RICHARD FARBER,
Attorneys.

NOVEMBER 1974.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

[Filed Jun. 12, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., DEFENDANTS

OPINION

Before CLARK, Circuit Judge; RUSSELL, Chief District Judge; and COX, District Judge.

CLARK, Circuit Judge:

> We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory.
>
> In arguing the case of McCulloch v. Maryland, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. . . . This was one of the

> anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." McCulloch v. Maryland, 4 Wheat. 316, 376, 4 L.Ed. 579. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

United States v. Allegheny County, 322 U.S. 174, 175-76, 64 S.Ct. 908, 910, —— L.Ed. —— (1944).

In the case at bar, the State of Mississippi and the federal government are brought into conflict through exercises of their respective sovereign power, which each claims is paramount to the other under the Constitution. More precisely, our task today is to determine whether the State's exaction of a tax on wholesale sales by independent vendors of liquor to federal military organizations violates the immunity of the United States from state taxation or impermissibly interferes with federal military procurement policy and regulations.

Under the XXI Amendment, the State of Mississippi controls the importation and sale of intoxicating liquor through an integrated statutory scheme under which the State Tax Commission is designated as the sole importer and wholesaler of alcoholic beverages, which may be distributed only to licensed retailers within the state, "including . . . any retail distributors operating within any military post . . .

within the boundaries of the State . . . ." [1] The statutory plan directs the Commission to "add to the cost of all alcoholic beverages [which it distributes to retailers] such . . . markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states." [2] Pursuant to its delegated authority, the Commission promulgated Regulation 25,[3] which gives military clubs an option to purchase liquor either from the Commission or directly from the distiller. Of the four military organizations involved,

---

[1] Miss. Code Ann. § 67-1-41 (1972).

[2] Miss. Code Ann. § 27-71-11 (1972).

[3] SALES TO MILITARY POST EXCHANGES, ETC.

Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

two are located on Keesler Air Force Base and the Naval Construction Battalion Center in Harrison County, Mississippi. The United States possesses exclusive jurisdiction over these bases. The remaining two are operated on Columbus Air Force Base and Meridian Naval Air Station in Lauderdale County, Mississippi. The United States and the State of Mississippi exercise concurrent jurisdiction on these bases. All of the clubs have opted to procure their liquor provisions directly from out-of-state distillers and suppliers. Under Regulation 25 these distillers and suppliers must remit the wholesale markup of 17% on distilled spirits and 20% on wine to the Commission or face severe sanctions.[4] After a considerable period of operations under the regulation, the United States instituted this litigation seeking declaratory and injunctive relief prohibiting application and enforcement of the regulation against purchases by the armed services clubs and a money judgment returning all revenues transmitted by these purchasers through their suppliers to the Commission. The complaint alleged that the State, through enforcement of Regulation 25, had unconstitutionally encroached upon the sovereignty of the United States by (1) legislating as to territory over which the federal government enjoys exclusive jurisdiction, (2)

[4] Any supplier who fails to comply with the regulation is subject to delistment—withdrawal of the privilege of distributing alcoholic beverages to the Commission for resale in Mississippi—and to criminal prosecution. *See* Miss. Code Ann. §§ 67-1-45, 27-71-347 (1972).

exacting a tax from federal instrumentalities, and (3) obstructing federal military procurement regulations and policy.

On the basis of the State's express XXI Amendment regulatory dominion over packaged liquor transactions, this court sustained the regulation in the face of the government's constitutional attacks, found it unnecessary to reach the remaining questions and rendered judgment in favor of the defendant Commission. United States v. State Tax Commission, 340 F.Supp. 903 (S.D. Miss. 1972). On direct appeal the United States Supreme Court reversed, holding that we erred "in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction . . . ." —— U.S. ——, ——, 93 S.Ct. 2183, 2187, —— L.Ed.2d —— (1973). The Court's mandate vacated the judgment for the Commission and remanded the cause to us for determination of the issues we declined to reach in our prior decision.[5]

[5] Although it is arguable that this declaratory and injunctive action would not fall within the ambit of 28 U.S.C. § 2281 if the sole basis of relief advanced by the government was premised on the repugnance of Regulation 25 to federal procurement policy and regulations, *see, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111, 86 S.Ct. 258, —— L.Ed.2d —— (1965); *see also* Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 43 S.Ct. 353, 67 L.Ed. 659 (1923), the substantial constitutional question raised by the government's assertion

I. *Exclusive Federal Enclaves*

While acknowledging that it cannot assert its XXI Amendment police powers as to the transportation or importation of intoxicating liquors into exclusively federal enclaves, the Tax Commission nevertheless contends that Congress has, by virtue of the Buck Act, 4 U.S.C.A. §§ 104-10 (Supp. 1974), authorized and consented to the application of Mississippi's markup to wholesale liquor transactions between nonresident distillers and suppliers and the federal operatives on such military bases. Section 105(a) of the Act provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal Area . . . ."

---

of State tax immunity renders this cause appropriate for disposition by three judges and satisfies the jurisdictional prerequisites of the statute. *See, e.g.,* Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, —— L.Ed.2d —— (1966); United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, —— L.Ed.2d —— (1963); Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, —— L.Ed.2d —— (1963); Query v. United States, 316 U.S. 486, 62 S.Ct. 1122, —— L.Ed. —— (1942); United States v. Livingston, 179 F.Supp. 9 (E.D.S.C. 1959), *aff'd,* 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960); *see also* Sands v. Wainwright, —— F.2d —— (5th Cir. 1973) [No. 73-1192, Dec. 26, 1973].

Act of July 30, 1947, § 1, 61 Stat. 644, 4 U.S.C. § 105(a).[6] Another provision of the statute, section 107(a), limits section 105(a) by providing that it "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ." 4 U.S.C.A. § 107(a) (Supp. 1974). The Supreme Court certified two Buck Act issues for determination by this court on remand: "Whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105(a), . . . and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves . . . ." —— U.S. at ——, 93 S.Ct. at 2193. Because we conclude that the first of these questions should be resolved in the affirmative and the second in the negative, we hold that Congress has legislatively acceded to Mississippi's markup on such wholesale liquor transactions.

At the election of the military, every sale at issue here is consummated directly between the military

---

[6] This statute was enacted in response to the decision in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, ——L.Ed. —— (1938), in which the Supreme Court held that the states had no constitutional power to tax the income or receipts from transactions occurring on or services performed in an area over which the United States possesses exclusive jurisdiction. S.Rep. No. 1625, 76th Cong., 3rd Sess. (1940). A state has jurisdiction to impose a tax only on those activities that are carried on within its territorial limits. James v. Dravo Contracting Co., *supra,* 302 U.S. at 138, 53 S.Ct. at 211.

organizations and the out-of-state liquor vendors without recourse to the State's wholesaling, warehousing or delivery service. The post exchanges, ship's stores, and officers' clubs chose the alternative course afforded by Regulation 25 of placing their orders directly with the wholesalers, who are required to mail immediately a copy of the order to the Commission.[7] The base price to the military vendees is determined solely by the vendor. All that Mississippi requires is that the vendor add the prescribed "wholesale markup" of 17% on whiskies or 20% on wines to the base price, and, after payment remit the amount of such markup to the Commission.

Neither party construes the markup as anything other than a tax. Although it serves to defray the cost to the State of its warehousing service and to regulate the traffic in intoxicating beverages, the markup is levied and recovered by compulsion of law in an amount that will, in the Commission's discretion, "yield a reasonable profit and be competitive with liquor prices in neighboring states." Such profits are paid into Mississippi's general revenue fund.[8] In this factual setting we do not hesitate to denominate the wholesale markup as a tax—"an exaction for the support of the government." United States v. Butler, 297 U.S. 1, 61, 56 S.Ct. 312, 317, —— L.Ed. —— (1936).

---

[7] *See* note 3, *supra*; Miss. Code Ann. § 67-1-73 (1972).

[8] Miss. Code Ann. § 27-71-29 (1972).

Similarly, the markup constitutes a "sales or use tax" within the ambit of section 105(a). Although it may more precisely be characterized as an excise or privilege tax on those who wish to distribute distilled spirits within Mississippi, the markup, however labeled, clearly conforms to the Buck Act's definition of a sales or use tax, namely "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property." 4 U.S.C.A. § 110(b) (Supp. 1974).

With these preliminary issues resolved, we must determine whether Mississippi has attempted to levy or collect a "tax on or from the United States or any instrumentality thereof" as condemned by section 107 (a). At the outset of this inquiry, it is clear that the ship's stores, officers' clubs and post exchanges "as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." Standard Oil Co. v. Johnson, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170 (1942); *see also* 5 U.S.C. § 2105(c).[9]

The government maintains that section 107(a) represents an express congressional reaffirmation of the

---

[9] For a discussion of the various hallmarks of federal instrumentalities see First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 352-54, 88 S.Ct. 2173, 2180-81, —— L.Ed.2d —— (1968) (Marshall, J., dissenting).

venerable principle of federal immunity from state taxation promulgated by McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819). That doctrine, it contends, constitutionally proscribes Mississippi's markup on wholesale liquor sales to these military vendees.[10] Although it has never been doubted that Congress is constitutionally vested with the authority to insulate federal instrumentalities, vendors and contractors from state taxation by extending the mantle of federal tax immunity beyond the bounds which the Supreme Court has determined the Constitution impliedly warrants,[11] neither the legislative history nor any judicial decision attributes to the Buck Act any congressional intention to exercise that legislative prerogative. We hold that section 107(a) goes

---

[10] The government contends also that the Buck Act cannot assent to state taxation of sales to military clubs on exclusive federal bases since those transactions, which are completed directly with out-of-state wholesalers, do not occur on the bases or in any area within the jurisdiction of the State of Mississippi. However, the very language of the Buck Act answers the argument. "[T]he sale . . . with respect to which such tax is levied," is within the Act's purview if it "occurred in whole or in part within a Federal area." 4 U.S.C. § 105(a). Certainly a crucial part of these sales—delivery for intended use—occurred on these bases.

[11] *See, e.g.*, First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 352, 362, 88 S.Ct. at 2180, 2185 (Marshall, J., dissenting); United States v. City of Detroit, 355 U.S. 466, 474, 78 S.Ct. 474, 478, 2 L.Ed.2d 424 (1958); United States v. Allegheny County, *supra*, 322 U.S. at 196, 64 S.Ct. at 920 (Frankfurter, J., dissenting); James v. Dravo Contracting Company, *supra*, 302 U.S. at 161, 58 S.Ct. at 221.

no further than to restate the constitutional limit.[12] Hence, we must reconcile Mississippi's wholesale liquor markup as applied *sub judice*, with that relatively obscure doctrine.

> For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which

---

[12] It is possible to construe the pertinent language of Section 107(a), which states that "[t]he provisions of Sections 105 and 106 . . . shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ," in either of two ways. The first interpretation would say that this portion of the Buck Act merely reaffirms the traditional immunity doctrine. The second view would read it as broadly declaring the federal government and its instrumentalities free from the burden of all State vendor and vendee sales or use taxes. However, in the absence of any contemporaneous congressional comment indicating that a total tax immunity for federal instrumentalities was intended, *see* S.Rep. No. 1625, 76th Cong., 3rd Sess. (1940), we opt for the first view. If an all-pervasive exemption was desired, more ample language than that which merely outlines the constitutional minimum as prescribed by *McCulloch* surely would have been chosen. The question of which construction is proper is not free of difficulty. *See* Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv.L. Rev. 633 (1945). Any state tax that abridges the federal government's immunity must, therefore, lie outside the consensual provisions of Section 105(a) by force of the exceptive language of Section 107(a), and vice versa.

they had before, barring only duties affecting exports, imports, and on tonnage. Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defence and general Welfare of the United States", Art. 1, Sec. 8, U.S.C.A. Const., can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its powers to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute [in McCulloch v. Maryland, *supra*] as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 488, 59 S.Ct. 595, 602, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring) (footnote omitted).[13] For over

---

[13] The doctrine was born of the necessity of protection of the functions of each sovereignty, operating in the same territory, from a frustrating taxing power of the other. Since the principle requires immunity from the economic burden of the other's taxes, it is not surprising that in an earlier year when governments were small and taxes

a century federal immunity was increscent. With consistency, courts disallowed state taxes on persons dealing with the government [14] until the seminal de-

---

and economics less complex, a concentration upon the economic burden should have led to an extension of the doctrine to persons dealing with the governments. Taxation of salaries of government employees and of the activities of vendors to government of goods and services created an econmic burden readily perceived, if imperfectly measured. Carried to its extreme in modern society, however, the logical extension of the doctrine would be ridiculous. Economists may estimate the total tax increment in the cost of a complicated machine or of construction of a building, but an attempt to relieve a purchasing sovereign of the economic burden of all taxes, however remote and indirectly imposed, would not only be impossible of accomplishment, but would seriously disrupt the functions of each of the dual sovereignties. Confinement of the extension was difficult, for distinctions between imposts more or less remote and indirect frequently lacked substance. Furthermore, it was not easy to see why the obligations of a manufacturer to the state and community, whose protection and services he enjoyed, should vary with the fluctuations in the ratio of his sales to the United States to his total sales.

United States v. Livingston, *supra*, 179 F.Supp. at 19-20 (Haynesworth, J.).

[14] In Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, —— L.Ed. —— (1928), the court invalidated Mississippi's privilege tax on retail gasoline dealers, which was measured by the amount of gasoline sold, as applied to retail sales to the Coast Guard and a Veteran's Hospital, both federal instrumentalities. The Court likewise overturned an Alabama excise tax on gasoline distributors as ratably imposed on their sales to the federal government in Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818, —— L.Ed. —— (1936).

Both *Panhandle Oil* and *Graves* were overruled to the extent they were inconsistent with the reasoning and result in Ala-

cisions in James v. Dravo Contracting Co., *supra*, and Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941), heralded a modern reappraisal of the doctrine.

> After having long been the subject of differences of opinion, the extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the Government and freedom from direct impositions upon the property and the instrumentalities of the Government. The decisions in James v. Dravo Contracting Co. [*supra*], and State of Alabama v. King & Boozer [*supra*], mean nothing unless they mean that it is not enough that the Government may ultimately have to bear the cost of a part or even the whole of a tax which a State imposes on a third person who has business relations with the Government, when a State could impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the Government.

---

bama v. King & Boozer, *infra*. What is left of their value as precedent is a matter of speculation only. We note also that the Court was faced with and unable to reach precisely the same question posed *sub judice* by enforcement of the markup as to military exchanges on exclusively federal enclaves in Query v. United States, *supra*, and Standard Oil Co. v. Johnson, *supra*.

United States v. Allegheny County, *supra*, 322 U.S. at 195-96, 64 S.Ct. at 919-20 (Frankfurter, J., dissenting) (citations omitted).

In *James* the Court sustained West Virginia's tax on the gross receipts of a government contractor, holding that the "valid exaction" was not a direct burden nor laid upon the federal government, its property, or its instrumentality and did "not interfere in any substantial way with the performance of federal functions . . . ." 302 U.S. at 161, 58 S.Ct. at 221. The *King & Boozer* Court upheld application of Alabama's sales tax to the purchase of lumber by a federal contractor for use in completing construction of an army camp under a cost-plus-fixed fee contract.[15] These cases buried the notion that a state exaction offended the Constitution merely because the United States or its operatives ultimately bore the economic burden imposed by the tax.

> The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the con-

---

[15] In Silas Mason Co. v. Tax Commission, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187 (1937), the Court approved an occupation tax levied by the State of Washington upon the gross receipts of a federal contractor who had been engaged in constructing the Grand Coulee Dam. The decision in Curry v. United States, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9 (1941), sustained enforcement of Alabama's use tax (against the same contractor involved in *King & Boozer*) as to material's purchased from an out-of-state vendor for performance of the federal contract.

tract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territoy of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. State ex rel. Knox, supra; Graves v. Texas Co., supra, we think it no longer tenable.

Alabama v. King & Boozer, *supra*, 314 U.S. at 8-9, 62 S.Ct. at 45.[16] *King & Boozer*, although incidental-

[16] Chief Justice Hughes wrote for the *James* Court as follows:

> There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which 'would operate on the power to borrow before it is exercised' . . . and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors. And in dealing with the question of a taxability of such contractors upon the fruits of their work, we are not bound to consider or decide how far immunity from taxation is to be deemed essential to the protection of Government in relation to its purchases of commodities or whether the doctrine announced in the cases of that character which we have cited deserves revision or restriction.

James v. Dravo Contracting Co., *supra*, 302 U.S. at 152-53, 58 S.Ct. at 217-18. The dissent of Mr. Justice Roberts details the pre-*James* concept of federal tax immunity. *See* 302 U.S. at 161, 58 S.Ct. at 221.

ly different on its facts from the instant case, established the principle, which has been subsequently refined and reaffirmed,[17] that the Constitution only forbids a state tax whose legal, as opposed to purely economic, incidence falls upon the federal government, its property or its instruments, either by virtue of the terms of the federal contract [18] or the plain words of the state's taxing legislation as sensibly construed. The touchstone for our inquiry, therefore, is the point of legal incidence of Mississippi's wholesale markup on alcoholic beverages.

[17] *See, e.g.*, United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518, —— L.Ed.2d —— (1964); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 382 *n.* 12, 84 S.Ct. 378, 388 *n.* 12, —— L.Ed.2d —— (1964); United States v. City of Detroit, *supra*; United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, —— L.Ed.2d —— (1958); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S.Ct. 403, —— L.Ed. —— (1954).

[18] In Kern-Limerick, Inc. v. Scurlock, *supra*, the Court distinguished *King & Boozer* and held that the federal cost-plus-fixed fee contract, which provided that the United States would assume title to and liability for materials purchased in performance thereof by the federal contractor, who had been delegated authority to act as the government's purchasing agent, operated to shift the legal incidence of a state sales tax from the contractor-purchaser to the federal government, thereby rendering it unconstitutional.

The abstraction "legal incidence" is a term that has never been explicitly formulated by the Supreme Court. We construe it to mean the legally enforceable, unavoidable liability for nonpayment of the tax. The legal incidence of a tax falls upon that entity or person to whom the state under a reasonable interpretation of its entire taxing scheme ultimately looks for satisfaction of the exaction. *Cf.* Colorado National Bank v. Bedford, 310 U.S. 41, 52, 60 S.Ct. 800, 805, —— L.Ed. —— (1940). The government argues that the "legal incidence" of a tax, which it contends connotes more than the direct obligation to pay, falls upon "a person who is unable to shift it onto someone else and who thereafter bears the money burden of the tax." It points here to the fact that it in the end must bear the cost of the markup since the supplier is required by the regulation both to collect it from the military purchaser and pay it over to the State. This proposition was laid to rest in *King & Boozer.* We conclude that under Regulation 25 as written and enforced the legal incidence of the markup attaches to the wholesaler despite the fact that he is required "in turn to remit" the wholesale tax to the Commission out of the proceeds of sale.

"[W]e are not bound by the state court's characterization of the tax," First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 347, 88 S.Ct. at 2177, which is ordinarily of great weight if it is consistent with a reasonable construction of the taxing scheme, American Oil Co. v. Neill, 380 U.S. 451, 85 S.Ct. 1130, —— L.Ed.2d ——

(1965); Colorado National Bank v. Bedford, *supra*, because "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." Kern-Limerick, Inc. v. Scurlock, *supra*, 347 U.S. at 121, 74 S.Ct. at 410; *see, e.g.*, United States v. Allegheny County, *supra*, 322 U.S. at 134, 64 S.Ct. at 914; Carpenter v. Shaw, 280 U.S. 363, 367-68, 50 S.Ct. 121, 123, —— L.Ed. —— (1930).

Although the parties have not cited and we have not found any Mississippi decision that judicially interprets either Regulation 25 or the applicable provisions of the alcoholic beverage control statute, our guideposts are plain.

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. . . . This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax.

American Oil Co. v. Neill, *supra*, 380 U.S. at 455, 85 S.Ct. at 1133 (citations omitted).

> [T]he implied immunity of one government and its agencies from taxation by the other should as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at

> the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

Graves v. New York ex rel. O'Keefe, *supra*, 306 U.S. at 483, 59 S.Ct. at 600.

Some time after Regulation 25 was adopted, wholesalers and military organizations began a practice of depositing the amount of the markup on each sale into an escrow account rather than remitting it to the State Tax Commission. When this practice was discovered the Director of the Alcoholic Beverage Control Division wrote a letter to all wholesalers which mandated strict compliance with the regulation, as it was interpreted in the director's letter, on pain of criminal penalties and delistment for all future sales in the State. The letter required the wholesaler to prepay the markup to the Commission at the time of shipment to the military customer and thereafter to invoice and collect the fee from the ship's store, officers' club or post exchange. We deem it significant that the letter's commands were directed to the numerous wholesalers involved, rather than to the four military establishments. Of equal cogency is the director's requirement that the wholesaler pay the tax *in advance* of its collection from his customer.

Since they chose not to deal with the Commission, the military-vendees' only financial responsibility is to the wholesaler for the debt incurred for the intoxicating liquors obtained. The vendor may fix the price at which he sells altogether free of any state control or restraint. Thus, it is he who controls where the

burden of the markup eventually falls. By adjusting his selling price he may absorb the markup entirely or pass some or all of it along to the military purchaser. In view of the decision to buy direct, the only effect on these military sales which necessarily results from Mississippi's law or regulation is the grant of an exemption from all "state taxes" under Regulation 25.

Only the wholesalers and suppliers have been or will be subject to criminal prosecution or economic sanction at the hands of the State. Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the markup's economic burden, nor do they return a percentage of the revenues to the wholesaler as a commission for collecting the tax. *See* First Agricultural National Bank v. State Tax Commission, *supra;* United States v. Nevada Tax Commission, 291 F.Supp. 530 (D. Nev. 1968), *aff'd*, 439 F.2d 435 (9th Cir. 1969). The purchaser-vendee is not legally or otherwise obligated to the Commission or the State for payment of the markup. *See* Alabama v. King & Boozer, *supra.*

Since the tax must be prepaid by the seller, it can never become a debt to the supplier separate from the total sales price, nor is it recoverable at law from the purchaser. Neither the statute nor the regulation contain a prohibition against advising or even advertising that the markup will be absorbed or refunded. *See* Federal Land Bank v. Bismarck, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941). Ultimately

the markup is paid from the assets or gross receipts of the wholesaler, *see* Colorado National Bank v. Bedford, *supra*, whose liability to the State cannot be defeated by his failure, inability, or refusal to collect the tax or by the impracticability of doing so. *See* United States v. Livingston, *supra*, 179 F.Supp. at 30 (Timmerman, D.J., dissenting). Any actual shift of the tax to the military which the wholesaler may be able to effect would be wholly negotiated rather than mandated by State law.[19]

---

[19] In contrast, Mississippi's *sales* tax must be added to the sale price and collected by the vendor from the vendee at the time of purchase. Miss. Code Ann. § 27-65-31 (1972). This sales tax not only constitutes a legal obligation from the vendor to the state, Miss. Code Ann. § 27-65-41 (1972), but creates a debtor-creditor relationship between the vendor and his vendee, who is legally liable to his vendor for the full amount of the tax, even if the seller has unlawfully failed to collect it from him. *See* Woodrich v. Catherine Gravel Co., 188 Miss. 417, 195 So. 307 (1940). We note also that the Navy Exchange Manual provides as follows:

> 2634 SALES AND USE TAXES
>
> The courts have made a distinction between the "legal incidence" of a tax and its "economic burden." Thus, the courts have come to hold that a state may not impose a tax, the "legal incidence" of which falls directly upon the Federal Government or any of its instrumentalities. That means that a state may neither require an Exchange to pay a tax which is imposed directly upon it, nor require it to collect a tax imposed upon its authorized patrons. A state may, however, validly impose a tax which affects the Exchange only indirectly by increasing the cost of the supplies that it purchases.
>
> In such a case, the economic burden would eventually fall upon the Exchange, but the legal incidence would be elsewhere. Therefore, when a state imposes a tax directly upon a supplier to the Exchange and it is his obligation to collect and pay it, the tax is valid, even though the Exchange would eventually bear the burden of the tax, economically, by paying higher prices.
>
> 2615 TAXES IMPOSED ON SUPPLIERS AND CONTRACTORS
>
> Federal and state taxes may be imposed on contractors and suppliers who have dealings with Exchanges. When the legal incidence of the tax is not on the Exchange, the constitutional immunity of the Exchange as a U. S. Government instrumentality does not apply. The Exchange, in the case of a tax on contractors or suppliers, would eventually bear the economic burden of the Tax in the form of increased cost of the supplies purchased, unless an exemption were provided by the taxing authority. However, this economic burden does not invalidate the tax.

The government's argument that the reasoning in First Agricultural National Bank v. State Tax Commission, *supra*, compels the conclusion in this case that the legal incidence of the markup falls upon the military purchasers is misplaced. There the Court held that the legal incidence of a state sales tax, which "by its terms must be passed on to the purchaser," was imposed not on the vendor, who was prohibited from advertising that he would assume or absorb the tax, but on the vendee national bank. Mr. Justice Black, writing for the majority, stated:

> We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the

clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling.

First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 348, 88 S.Ct. at 2178. The instant wholesale liquor markup on military sales is not afflicted with either of the statutory infirmities that Mr. Justice Black found compelling. When considered within the factual matrix of this record, it is abundantly clear that the legal incidence of the markup was intended to be levied upon and borne by the controlled wholesaler rather than the military purchaser.[20]

---

[20] *See* K. Wolf, State Taxation of Government Contractors 221-29 (1964); Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 757, 763 (1945). *Compare* American Oil Co. v. Neill, *supra* (legal incidence of privilege tax on gasoline dealer-vendor); Polar Ice Cream & Creamery Co. v. Andrews, *supra* (legal incidence of privilege tax on milk processor-distributor); Esso Standard Oil v. Evans, 345 U.S. 495, 73 S.Ct. 800, 97 L.Ed. 1174 (1953) (legal incidence of gasoline storage tax on distributor); Howard v. Commissioners of Sinking Fund, 344 U.S. 624, 73 S.Ct. 465, —— L.Ed. —— (1953) (legal incidence of city income-privilege tax on earnings of government employees); Norton Co. v. Dept. of Revenue, 340 U.S. 534, 71 S.Ct. 377, —— L.Ed. —— (1951) (legal incidence of privilege-sales tax on vendor); Silas Mason Co. v. Tax Commission, *supra* (legal incidence of privilege tax on federal contractor); United States v. Dept. of Revenue, 202 F.Supp. 757 (N.D. Ill. 1962), *aff'd*, 371 U.S. 21, 83 S.Ct. 117, 9 L.Ed. 95 (1963) (legal incidence of privilege-sales and use taxes on retailer); United States v. Sharp, 302 F.Supp. 668 (S.D. Miss. 1969) (legal incidence of privilege-sales tax on gasoline distributor) *with* Sullivan v. United States, 395 U.S. 169, 89 S.Ct. 1648, —— L.Ed.2d —— (1969)

On these facts, therefore, we conclude that the markup, which is a tax on sales occurring within a federal area within the scope of section 105(a), lies outside the section 107(a) exception to the Act's consent provision since Mississippi has not attempted to levy or collect any tax on or from the United States or any instrumentality thereof. Because the wholesale markup lies within the consensual ambit of the Buck Act, we hold that Congress has waived any federal challenge to the authority in the State of Mississippi over these transactions and has assented to the state's enforcement of Regulation 25 on Kessler Air Force Base and the Naval Construction Battalion Center over which the United States exercises otherwise exclusive jurisdiction. *See* Polar Ice Cream & Creamery Co. v. Andrews, *supra*, 375 U.S. at 383, 84 S.Ct. at 391; *cf.* Howard v. Commissioners of Sinking Fund, supra.[21]

(legal incidence of sales and use taxes on purchaser); First Agricultural National Bank v. State Tax Commission, *supra* (legal incidence of sales and use taxes on vendee national banks); Kern-Limerick, Inc. v. Scurlock, *supra* (legal incidence of sales tax on purchaser); Curry v. United States, *supra* (legal incidence of use tax on purchaser); Alabama v. King & Boozer, *supra* (legal incidence of sales tax on purchaser); Federal Land Bank v. Bismarck, *supra* (legal incidence of sales tax on purchaser); Colorado National Bank v. Bedford, *supra* (legal incidence of service tax on user); United States v. Livingston, *supra* (legal incidence of sales and use taxes on purchaser); United States v. Nevada Tax Commission, *supra* (legal incidence of sales and use taxes on purchaser).

[21] Because we hold that the United States has assented statutorily to application of the markup to purchases of liquor

II. *Concurrent State and Federal Enclaves*

We now turn our attention to the somewhat different problems that arise from enforcement of the markup on Columbus Air Force Base and Meridian Naval Air Station, over which Mississippi and the United States enjoy concurrent sovereignty. Because the State's XXI Amendment power to regulate distilled spirits by definition extends to joint state and federal enclaves, the Supreme Court concluded that, on this remand, the government would be unable "to rest its claim for immunity from the markup with respect to purchases of liquor for the nonappropriated fund activities of these bases on Art. I, § 8, cl. 17." —— U.S. at ——, 93 S.Ct. at 2193. This portion of the Constitution empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

The government restates its contention that, when applied to purchases by military clubs on concurrent state and federal areas, the markup infringes the constitutional immunity of federal instrumentalities

---

by the military clubs on the exclusively federal bases, we need not reach the government's contention that the regulatory and taxing scheme impermissibly interferes with federal liquor procurement policy and regulations, a question which we resolve against the government's position in part II, *infra*, as to purchases by the military on concurrent state and federal areas.

from state taxation. In addition, it contends that enforcement of the Commission's regulatory and taxing scheme on these military purchases of alcoholic beverages is constitutionally repugnant to the Supremacy Clause because this exercise of state power conflicts with federal military procurement regulations and policy. Our prior holding, however, that the wholesale markup does not abridge the military's constitutional and Buck Act immunity from state taxation on exclusive jurisdiction bases applies with equal force against, and hence forecloses the government's assertion of similar immunity with respect to wholesale purchases by military affiliated organizations on joint state and federal areas as well.

The Tax Commission contends that the consensual language of the Buck Act, 4 U.S.C. § 105(a), which we hold permits Mississippi to enforce the markup on exclusively federal military enclaves, is also applicable to and allows its enforcement against liquor purchases by the military on the joint state and federal bases. Section 105(a) waives immunity from state taxation "on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." Section 110(e) of the Act, which defines a federal area as "any lands or premises held or acquired by or for the use of the United States . . .

which [are] located within the exterior boundaries of any State . . . ," does not settle the point. The legislative history, however, demonstrates that the Act was designed to overrule that portion of the decision in James v. Dravo Contracting Co., *supra*, which exempted from state taxation the income or receipts from transactions occurring or services performed within exclusively federal enclaves. At the same time the *James* Court sustained the state's power to tax income or receipts which were derived from activities that occurred on areas subject to concurrent state and federal jurisdiction. The legislative history, therefore, supports the inference that the Buck Act was not intended to apply to concurrent state and federal enclaves, to which the state's taxing jurisdiction already extends by conveyance or consent. *See* James v. Dravo Contracting Co., *supra*. The Buck Act only operates to restore parity to an existing State right to tax. It does not create any new taxing power on the concurrent jurisdiction bases. Indeed, it contains an express disclaimer of any waiver of the federal government's constitutional immunity from State taxation. 4 U.S.C. § 107(a).

Our concluding task is to harmonize the State's XXI Amendment prerogative and the power of the federal government to execute its military procurement policy on concurrent jurisdiction bases. Art. I, § 8, invests Congress with authority "[t]o make all laws which shall be necessary and proper for carrying into Execution" its delegated power "[t]o provide for organizing, arming, and disciplining, the

Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ." Art. IV, § 3, cl. 2, grants it "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Pursuant thereto, Congress enacted 50 U.S.C. App. § 473, which provides:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

Acting in accordance with his delegated authority, the Secretary of Defense promulgated Department of Defense Directive 1330.15, 32 C.F.R. § 261 (1973), which sets forth in pertinent part department policy governing the purchase and sale of alcoholic beverages by all components of the armed services through on-base outlets:

> 1. [The Department of Defense] will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such

a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

32 C.F.R. § 261.4(c) (1966) (emphasis added). On June 9, 1966, the directive was amended by deleting the italicized words in ¶ 1.

Pointing to the decisions in Paul v. United States, *supra*, and Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, —— L.Ed. —— (1943), the United States contends that enforcement of Regulation 25 by the State disrupts the federal policy of competitive procurement of alcoholic beverages under the most favorable terms to the military operatives, as reflected in the Secretary's directive, and improperly imposes significant operating conditions on the activities of federal instrumentalities.

In an important antecedent to these precedents, Penn Dairies, Inc. v. Milk Control Commission, 318 U.S. 261, 63 S.Ct. 617, —— L.Ed. —— (1943), it was asserted that Pennsylvania's regulation of the minimum wholesale price of milk on direct sales from suppliers to military establishments on commonwealth-owned land conflicted unconstitutionally with a federal procurement policy of competitive bidding. The Supreme Court initially noted that the Constitution empowered Congress to set aside state taxation and regulation of government contractors which burdens the federal government. In view of this power, it upheld the state's regulatory program, declaring that where Congress has not expressed a limitation, courts should not imply a constitutional restriction upon otherwise valid exercises of state power.

Mayo v. United States, *supra*, established as a corollary to federal immunity from state taxation, the principle that, without congressional approval, the functions of federal instrumentalities must be free of restrictive state regulation. *Mayo* invalidated Florida's regulatory quality controls on commercial fertilizer (which required each bag of fertilizer sold or distributed within the state to carry the label or stamp which evidenced payment of the state's inspection fee) as applied to fertilizers purchased by the United States Department of Agriculture and distributed to Florida farmers participating in a federal soil conservation program. This paragraph from the Court's opinion is especially significant here:

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing as in Graves v. State of New York, etc., supra, with a tax upon the salary of an employee, or as in State of Alabama v. King & Boozer [*supra*] with a tax upon the purchases of a

supplier, or as in Penn Dairies, Inc. v. Milk Control Comm. of Pennsylvania [*supra*], with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. . . . But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Mayo v. United States, *supra*, 319 U.S. at 447-48, 63 S.Ct. at 1140-41 (citations and footnote omitted); *see* Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 77 S.Ct. 257, —— L.Ed.2d —— (1956); Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920).

Paul v. United States, *supra*, overturned California's regulation of the minimum wholesale milk prices paid by vendee military clubs and post exchanges as antagonistic to revised armed services

procurement regulations. The Court concluded that the state's policy operated impermissibly there to eliminate competition.[22] *Penn Dairies* was distinguished on the basis of a change in federal procurement regulations. The regulations which were in effect when *Penn Dairies* was decided were considered to manifest a federal "hands off" policy regarding state minimum price legislation. On the other hand, the *Paul* court found that "[t]he present [revised] Regulation makes no such allowances, contains no such qualifications, and provides for no such exception. Its unqualified command is that purchases for the Armed Services be made on a competitive basis; and it has, of course, the force of law." 371 U.S. at 254-55, 83 S.Ct. at 433.

Neither *Paul* nor *Mayo* are apropos here. Clearly Mississippi has not interfered with competition between wholesale vendors of alcoholic beverages to the military. Regulation 25 does not fix any price nor does it constitute any form of minimum price regulation. It applies evenly to all wholesale sales across the board. Moreover, the Buck Act evinces congressional acquiescence to the state's taxing and regulatory scheme. Since the markup applies prorata to all wholesale liquor transactions, it does not alter the vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor pro-

[22] *See* United States v. Georgia Public Service Commission, *supra*; Public Utilities Commission v. United States, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958).

curement under "the most advantageous contract, price and other factors considered."

Neither has Mississippi legislated directly or indirectly so as to impair any function of these federal instrumentalities. The parties have stipulated that payment of the markup has not prevented profitable operation by the officers' clubs, ship's stores and post exchanges. Indeed, the military organizations, which are prohibited by Defense Department regulation from underselling local retailers by more than 10%,[23] are not only permitted to purchase their intoxicating liquors at wholesale prices, but also are exempt from the 2.50 dollars per gallon excise tax charged to private Mississippi retailers,[24] who must also collect from their customers the state's 5% sales tax from which vendees of the military clubs are exempt under the Buck Act.[25] The government has not asserted that enforcement of the markup compromises any federal military goal or function, or that the state has imposed insufferable conditions on the military affiliates which stifle their operations. Nor has the government contended that Congress intended to abrogate or subordinate the state's XXI

[23] 32 C.F.R. § 261.5(b) (3) (ii) (1973).

[24] The parties have stipulated that other monopoly or control states collect a larger markup on military liquor purchases than Mississippi. Furthermore, California, a license state, collects an excise tax of 2.00 dollars per gallon of distilled spirits on all purchases by the military or by the United States, relying on the Buck Act.

[25] 4 U.S.C.A. § 107(a) (Supp. 1974).

Amendment regulatory authority over liquor to any valid federal military purpose. Only the vendor, in his individual capacity, is subject to state control. The government's complaint is based solely upon the fact that it must bear the economic incidence of the markup. The most that can be said is that Regulation 25 may reduce the military's profit margin from retail liquor sales. The slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment.

We reject the government's argument that the markup is void as incompatible with federal procurement policy and regulations under Paul v. United States, *supra*, or as an impermissibly inhibitive regulation of the valid functions of a federal military instrumentality under Mayo v. United States, *supra*. *See* James v. Dravo Contracting Co., *supra*.

III. *Conclusion*

Although the United States ultimately bears the economic burden of Mississippi's tax on the gross receipts from sales of liquor and wine by wholesalers and distillers, the legal incidence of the exaction is upon the seller. *James* v. *Dravo Contracting Company* and *King & Boozer*, *supra*, authorize this exaction. The constitutional balance between the war power decision of the United States to provide its armed forces personnel with low cost intoxicating beverages on Mississippi bases and the XXI Amend-

ment power of the State to regulate traffic in such commodities weighs in favor of the State. There being no discrimination against the federal government within the State's tax scheme,[26] any adjustment of the resultant intergovernmental tax consequences must come from the Congress.

[26] *See, e.g.*, Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S.Ct. 870, —— L.Ed.2d —— (1961); Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S.Ct. 474, —— L.Ed.2d —— (1960); United States v. City of Detroit, *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

[Filed Jul. 12, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION, ET AL., DEFENDANTS

JUDGMENT

By virtue of and pursuant to the opinion of the three-judge court in this case, which is adopted and made a part hereof by reference thereto, it is now ordered and adjudged by the Court that the claim of the United States in this case is without merit and that the complaint thereon should be and is in its entirety dismissed with prejudice without any assessment of costs.

ORDERED AND ADJUDGED, this July 12, A.D., 1974 by express authority of the other two judges on this panel, as managing judge herein.

/s/ [Illegible]
United States District Judge

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS
Clerk

By: /s/ G. Burdett
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

[Filed Aug. 8, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, Chairman; JIMMIE WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on July 12, 1974.

This is an appeal from a final judgment, after notice and hearing, denying a permanent injunction in a civil action required by Section 2281, Title 28, United States Code, to be heard and determined by

a District Court of three judges, and this appeal is being taken under the provisions of Section 1253, Title 28, United States Code.

ROBERT E. HAUBERG
United States Attorney

By
/s/ Joseph E. Brown, Jr.
JOSEPH E. BROWN, JR.
Assistant United States Attorney

Attorney for the United States of America
Post Office Box 2091
Jackson, Mississippi 39205

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI, AND THE STATE OF MISSISSIPPI, DEFENDANTS

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air

Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secretary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.*, Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County, Mississippi, Mrs. Anna J. Ott, et al.*, Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.*, Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess—open, Navy Exchange

Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

Subject Alcoholic Beverage Control.
References:

(a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.

(b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).

(c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).

I. AUTHORITY AND PURPOSE

Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Departments which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recrea-

tion, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for packaged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of the Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations

and findings made in accordance with the criteria as stated above.

3. Controls

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to authorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. Eligibility for patronage of sales outlets

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ASD (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

> The following pen change in DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately*:
>
> *PEN CHANGE* to *Page 2, Section IV.C.1*:
>
> Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Director, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265—01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within

the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966", which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC.
EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%.

This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed in Paragraph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State

of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.

You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended*, therefore, all provisions remain in force and shall be strictly adhered to:

REGULATION No. 22

SALES TO MILITARY POST EXCHANGES, ETC.
EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the

Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. Beacham, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers", on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee

must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*

If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.

Yours very truly,

/s/ A. V. Beacham, M.D.,
A. V. BEACHAM, M.D., *Director*,
Alcoholic Beverage Control
Division,
State Tax Commission.

AVB:am

(Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permits, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other nonappropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34-57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176-1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176-3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base*: Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base*: Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center*: Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales),

$20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian*: Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers Mess—open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

> "5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?
>
> Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the surrounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the

service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from

a morale standpoint that each installation furnish substantially similar off-duty facilities for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

/s/ Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff,
United States of America.

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General
for the State of Mississippi.

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant,
State Tax Commission of
the State of Mississippi.

APPENDIX E

[State Emblem]

ALCOHOLIC BEVERAGE CONTROL DIVISION
STATE TAX COMMISSION

Jackson, Mississippi 39205

Members of Tax Commission
Arny Rhoden, Chairman
Robert A. Biggs, Jr., Commissioner
Robert L. Vaughan, Sr., Commissioner

Uree Garner, Director
A. B. C. Division

Telephones:
Central Office 354-6282
Warehouse 354-6235

August 8, 1973

Commanding Officer
Keesler Air Force Base
Building 1404
Biloxi, Mississippi

Dear Sir:

Attached is a copy of a memorandum regarding the Mississippi Alcoholic Beverage Control Division Regulation No. 25. This memorandum has been sent to the vendors from whom merchandise is purchased for the State of Mississippi.

I am going to request that you inform your purchasing personnel of the contents of my memorandum to the vendors and will ask that they follow the instructions contained therein.

Thank you very much for your cooperation in this matter.

Very truly yours,

/s/ Uree Garner
Uree Garner, Director
Alcoholic Beverage
Control Division

UG/sdh
Enclosures

[State Emblem]

ALCOHOLIC BEVERAGE CONTROL DIVISION
STATE TAX COMMISSION

Jackson, Mississippi 39205

Members of Tax Commission:
Arny Rhoden, Chairman
Robert A. Biggs, Jr., Commissioner
Robert L. Vaughan, Sr., Commissioner

Uree Garner, Director
A. B. C. Division

Telephones:
Central Office 354-6282
Warehouse 354-6235

8 August 1973

TO: ALL VENDORS

ATTENTION: CONTROL STATE MANAGERS

FROM: UREE GARNER

SUBJECT: REGULATION NO. 25 "SALES TO MILITARY POST EXCHANGES, ETC.

Attached is a copy of Regulation No. 25. Your attention is called to the option given to post exchanges, ship stores, and officers' clubs operated by military personnel (including those operated by the National Guard). The choice is granted to the purchasing direct from the *distiller* or from the Alcoholic Beverage Control Division of the State Tax Commission. Purchases are not to be placed with any other source.

/s/ Uree Garner
Uree Garner, Director
Alcoholic Beverage
Control Division

UG/sdh

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

1. Article I, Section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
>
> To raise and support Armies, * * *
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, Section 3, provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Article VI provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. Section 105(a) of the Buck Act, 61 Stat. 644, 4 U.S.C. 105(a), provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Section 107(a) of the Act, 61 Stat. 645, as amended, 4 U.S.C. 107(a), provides:

> The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any in-

> strumentality thereof to any authorized purchaser.

Section 110 of the Act, 61 Stat 645, 4 U.S.C. 110, provides in part:

> As used in sections 105-109 of this title—
>
> (a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.
>
> (b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.
>
> * * * *
>
> (e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

3. Section 10265-18(c) of the Mississippi Local Option Alcoholic Beverage Control Law, 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-18(c), provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at

wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act. * * *

Section 10265-106 of the Mississippi Local Option Alcoholic Beverage Control Law, 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-106, provides in part:

> The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

4. Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the

distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 562423 60

Court, U. S.
FILED
FEB 27 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

FILED NOVEMBER 6, 1974
PROBABLE JURISDICTION NOTED JANUARY 13, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

INDEX OF APPENDIX

	Page
Judicial Proceedings:	
Docket Entries	1
In the United States District Court for the Southern District of Mississippi:	
Complaint	6
Application for Convening of Three-Judge District Court	14
Answer	15
Plaintiff's Answer to Defendants' Interrogatories (Excerpts)	20
Defendants' Motion for Summary Judgment	25
Plaintiff's Cross-Motion for Summary Judgment	27
Stipulation of Facts	29
Exhibit 8, Memorandum for Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966	43
Exhibit 9, Memorandum for Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966	45
Exhibit 10, Memorandum for Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966	50

Judicial Proceedings—Continued
In the United States District Court—Continued
Stipulation of Facts—Continued Page
Exhibit 11, Memorandum for the Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966.. 52
Exhibit 12, Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966..... 54
Exhibit 13, Memorandum for the Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966. 55
Exhibit 14, Memorandum for the Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966..... 57
Exhibit 15, Letter to Mr. Charles B. Buscher, Executive Director, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966.. 58
Order of November 13, 1972 Noting Probable Jurisdiction.. 59
Supplemental Stipulation..... 60
Letter to Commanding Officer, Keesler Air Force Base, from Uree Garner, Director Alcoholic Beverage Control Division, dated August 8, 1973..... 63
Memorandum for all vendors from Uree Garner, Director Alcoholic Beverage Control Division, dated August 8, 1973..... 63
Order of January 13, 1973 Noting Probable Jurisdiction.... 64

Docket Entries

In the United States District Court for the Southern District of Mississippi Jackson Division

(Civil Action No. 4554)

Date	Filings—Proceedings
11-3-69	Complaint, original and ten copies, filed.
11-3-69	Applicant of Plaintiff for convening Three-Judge District Court, original and three copies, filed.
11-3-69	Summons, original and seven copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
11-3-69	Copy of complaint and application for convening of three-judge court mailed Judge Walter L. Nixon, Jr.
11-12-69	Designation by Chief Judge John R. Brown of Circuit Judge Charles Clark and District Judges Harold Cox and Dan M. Russell, Jr., to hear and determine the cause. Filed and entered OB 1969, P. 1129-1130.
11-12-69	Copy of Designation and copy of complaint handed Sue for Judge Cox, mailed Judge Russell and Judge Clark.
11-28-69	Marshal's return on summons executed as to each and all defendants, filed.
12-11-69	Motion of Defendants for additional time within which to file answer with certificate of service, filed.
12-15-69	ORDER: Defendants granted additional thirty days from date of this order to file an answer. Filed and entered OB 1969, P. 1223. (copies mailed attorneys of record)
12-29-69	Letter from U.S. Attorney requesting issuance of alias summons to all defendants, filed.

Date	Filings—Proceedings
12-29-69	Alias Summons, original and five copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
1-7-70	Marshal's return on summons executed as to Arny Rhoden, State Tax Commission, Jimmie Walker, Excise Tax Commissioner, Woodley Carr, Ad Valorem Commissioner, Kenneth Stewart, Director of Alcoholic Beverage Control Division, filed.
1-19-70	Motion of Defendants for a more definite statement with certificate of service, filed.
1-19-70	Notice of Motion of Defendants for a more definite statement for 2-20-70 at Jackson, Mississippi with certificate of service, filed.
5-12-70	ORDER: Motion for a more definite statement is overruled and prayer thereof denied. Defendants are granted an extension of time until 5-21-70 in which to answer. Filed and entered OB 1970, P. 715 (copies mailed attorneys of record)
5-21-70	Answer of defendants to complaint, with certificate of service, filed.
5-22-70	Copy of above Answer mailed Judges Russell and Clark, handed Anne Crews for Judge Cox
7-15-70	Interrogatories of Defendants to Plaintiff, filed.
8-12-70	ORDER: United States have additional time until 9-4-70 to answer interrogatories. Filed and entered OB 1970, P. 1121. (Copy handed U.S. Attorney, mailed Taylor Carlisle and Guy Rogers)
8-19-70	Interrogatories to Defendant Pursuant to Rule 33, Federal Rules of Civil Procedure, with Certificate of Service, filed.
9-8-70	Plaintiff's objections to Defendant's interrogatories, with certificate of service, filed.
9-8-70	Plaintiff's answer to Defendants' interrogatories with certificate of service, filed.

Date	Filings—Proceedings
10-5-70	Answer of Defendants to Interrogatories by Plaintiff with certificate of service and attached copy of letter, filed.
2-4-71	Defendants' Motion for Summary Judgment with Memorandum in Support thereof attached, with certificate of service, filed.
2-4-71	Defendants' Notice of Motion for Summary Judgment for hearing on 2-26-71 in Jackson, Miss., filed.
2-4-71	Defendants' Withdrawal of Certain Interrogatories Propounded to Plaintiff by Defendants, with certificate of service, filed.
2-4-71	Copy of defendants' Motion for Summary Judgment and attached Memorandum in support thereof handed Judge Cox, mailed Judges Russell and Clark.
9-22-71	Stipulation of Facts between Plaintiff United States of America and Defendants State Tax Commission of the State of Mississippi, et al, with attachments, filed.
9-22-71	Copy of above Stipulation mailed Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-28-71	Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, with attached Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment, and certificate of service, filed.
9-28-71	Copies of above Motion and Memorandum mailed to Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-29-71	Defendant's opposition to plaintiff's Cross-Motion for Summary Judgment with certificate of service, filed. (Copy handed Judge Cox.

Date	Filings—Proceedings
	Copies mailed Judges Dan M. Russell and Judge Charles Clark ON 9/30/71).
3–24–72	OPINION: Defendants are entitled to summary judgment on all issues, filed. (Judge Charles Clark) (Copies mailed attorneys of record) (Memo to J. Nall)
3–24–72	SPECIAL CONCURRING OPINION: . . . The complaint in this case is without merit and should be dismissed without prejudice without any assessment of cost, filed. (WHC) (Copies mailed all attorneys of record) (Memo to J. Nall)
3–30–72	JUDGMENT: the complaint in the captioned case is without merit and is dismissed with prejudice without any assessment of costs, filed and entered OB 1972, Page 401 (Charles Clark, DMR, WHC) (Copy mailed attorneys; copy handed Judge Cox and mailed Judges Russell and Clark) (Memo to J. Nall & J. Speights)
3–30–72	Final J.S. 6 Card.
5–1–72	Plaintiff's Notice of Appeal to Supreme Court of the United States from final judgment of 1–30–72, with certificate of service, filed. (Certified copy mailed Supreme Court)
12-4-72	Cert. copy of Order of Supreme Court of U.S.: the statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted, filed and entered OB 1972, Page 1425.
6-8-73	Slip Opinion of Supreme Court of U.S.: judgment of District Court is vacated and case remanded for further proceedings consistent with this opinion . . . It is so ordered, filed.
6-8-73	J.S. 5 Card.

7-6-73	Certified copy of JUDGMENT OF U.S. SUPREME COURT: judgment of District Court is vacated with costs and cause remanded for further proceedings in conformity with opinion of this Court; further that U.S. recover from State Tax Commission, et al $578.00 costs, filed and entered OB 1973, page 1036.
11-2-73	EXHIBIT: Gov't No. 1, filed.
6-12-74	OPINION rendered by Circuit Judge CLARK, on hearing before Judges Clark, Russell & Cox filed. (Copy handed U.S. Attorney, mailed other attorneys of record) (Judge Clark's office stated to Mr. Thomas that copies have been furnished to Judges Cox and Russell)
6-26-74	Copy of Opinion mailed West Publishing Company.
7-12-74	JUDGMENT: Pursuant to opinion of three-judge court, which is adopted and made a part hereof by reference thereto, it is ordered that claim of the U.S. is without merit and complaint is in its entirety dismissed with prejudice without any assessment of costs. Ordered by express authority of the other two judges on this panel, as managing judge herein, filed and entered OB 1974, page 1031. (Copies mailed all attys. of record and William H. Frake, Robert L. Wright, William G. Clark and Judges Clark and Russell)
7-12-74	FINAL JS 6 CARD FILED.
8-8-74	Plaintiff's Notice of Appeal to Supreme Court of the United States from Final Judgment of 7–12–74, with Certificate of Service, filed.

A true copy, I hereby certify.

ROBERT C. THOMAS, *Clerk.*

By: /s/ S. CARTER,

Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMIE WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI,
DEFENDANTS.

[Filed November 3, 1969]

COMPLAINT

The United States of America alleges the following:

1. The Court has jurisdiction of this action under 28 U.S.C. 1345.

2. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

3. The lands comprising Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base and the Meridian Naval Air Station were purchased by the United States with the consent of the State of Mississippi.

4. The State of Mississippi ceded to the United States and the United States accepted exclusive jurisdiction over the lands comprising Keesler Air Force Base and the United States Naval Construction Battalion Center; and Keesler Air Force Base and the United States Naval Construction Battalion Center are situated on lands over which the United States has exclusive jurisdiction.

5. The State of Mississippi ceded to the United States

and the United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station; and Columbus Air Force Base and the Meridian Naval Air Station are situated on lands over which the United States and the State of Mississippi have concurrent jurisdiction.

6. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmens' Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—Closed, Chief Petty Officers' Mess—Open, Enlisted Men's Club, and the Navy Exchange Department of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—Open, the Commissioned Officers' Mess—Closed, the Commissioned Officers' Mess—Open, the Navy Exchange Enlisted Mens' Club, and the Centralized Package Store at Meridian Naval Auxilliary Air Station are Instrumentalities of the United States operating with nonappropriated funds, are entitled to the sovereign immunities and privileges of the United States, are located in the State of Mississippi and are or have been engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned. These agencies are referred to hereinafter as "Instrumentalities of the United States."

7. Under its enumerated powers concerning regulation of land and naval forces and military reservations pursuant to Art. I, Sec. 8, Cl. 14 of the Constitution of the United States, the Congress, in Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473, authorized the Secretary of Defense "to make such regulations as he may deem appropriate governing the sale, consumption, possession of or traffic in • • • intoxicating liquors to or by members of the Armed Forces at or near any camp • • • or other place primarily occupied by members of the Armed Forces • • •".

8. Pursuant to the above cited authority, the Secretary of Defense issued Department of Defense Directive 1330.15 dated 4 May 1964, 32 CFR 261.4(c). This Directive requires that the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within

567-894 O - 75 - 2

the United States shall be in such a manner and under such conditions as shall obtain for the Government of the United States the most advantageous contract, price and other factors considered.

9. The Armed Services Procurement Act, 10 U.S.C. 2305(c) requires that a contract be granted to the bidder whose bid "will be the most advantageous to the United States, price and other factors considered." Although the Act applies only to appropriated fund activities of the Armed Services of the United States, its requirement that procurement be at the most advantageous price has been adopted by the Secretary of Defense in said Directive as the governing procurement policy for the aforesaid Instrumentalities of the United States.

10. The Directive and procurement policy adopted from the Act referred to in Pars. 8 and 9 hereinabove require the aforesaid Instrumentalities of the United States engaged in the purchase of alcoholic beverages for resale to obtain said alcoholic beverages at the lowest competitive price most advantageous to the United States.

11. The State of Mississippi Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 et seq., enacted July 1, 1966, imposes strict regulatory control on the possession and sale of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

12. Sec. 10265-01 et seq. of the Mississippi Code (1942) Annotated, was enacted after the United States obtained jurisdiction over the lands upon which the aforesaid Instrumentalities of the United States are situated, all as described in paragraphs 4 and 5 hereinabove.

13. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., effective September 1, 1966," hereinafter referred to as Regulation 22, which attempts to regulate, tax and control Instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

14. Regulation 22 requires the aforesaid Instrumentalities of the United States to order alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

15. Regulation 22 further requires the aforesaid Instrumentalities of the United States to pay a seventeen percent "mark-up" on distilled spirits and a twenty percent "mark-up" on wine, whether purchases are made directly from the distiller or from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These "mark-ups" are percentages of the normal wholesale purchase price and are added on to such purchase price.

16. When purchasing alcoholic beverages from distillers or suppliers, the State of Mississippi requires the aforesaid Instrumentalities of the United States to pay the aforementioned "mark-ups" to the distillers and/or suppliers and said distillers and/or suppliers to collect said "mark-ups" and in turn remit them directly to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

17. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission requires that the "mark-ups" be paid by the aforesaid Instrumentalities of the United States when making purchases directly from distillers and/or suppliers although the State does not handle the merchandise in connection with such purchases, does not provide any facilities, and does not perform any services in connection with such purchases, the net result of Regulation 22 being that the so-called "mark-ups" are in fact taxes.

18. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission is not a party to purchases by the aforesaid Instrumentalities of the United States from distillers and/or suppliers.

19. Regulation 22 requires distillers and/or suppliers which sell alcoholic beverages to the Instrumentalities of the United States located in the State of Mississippi, to strictly observe said regulation and any distiller and/or supplier who fails or refuses to strictly observe Regulation 22 is considered to have violated the Alcoholic Beverage Control Laws of the State of Mississippi and is promptly deprived of the benefits of same including the right to sell

his products to the Alcoholic Beverage Control Division, the sole authorized wholesaler in the State of Mississippi; and in addition thereto he may be prosecuted for violation thereof and subjected to criminal penalties therefor. As a result distillers and/or suppliers, fearful of losing the opportunity to sell their products to the agencies of the State of Mississippi and fearful of criminal prosecution, have refused and continue to refuse to sell their products to the aforesaid Instrumentalities of the United States without collecting from these Instrumentalities the so-called "mark-up" percentages and remitting them to the said Division.

20. As a condition for doing business in the State of Mississippi distillers and/or suppliers are required to furnish the Alcoholic Beverage Control Division of the State a price list and to agree not to sell to any of the aforesaid Instrumentalities of the United States at a lower price than to the State of Mississippi.

21. Defendants have sought to require each of the aforesaid Instrumentalities of the United States to obtain an alcoholic beverage permit from the Alcoholic Beverage Control Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi.

22. Defendants are prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by Instrumentalities of the United States located in the State of Mississippi.

23. The aforesaid Instrumentalities of the United States have made these "mark-up" payments under protest to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission either directly or indirectly through distillers and/or suppliers in an amount in excess of $319,740.51 since September 1966 and continue to do so under protest.

24. The acts of the defendants aforementioned have caused damage to the aforesaid Instrumentalities of the United States in an amount in excess of $319,740.51 and will continue in a proportionate amount or more for the foreseeable future. Such sums paid and to be paid legally belong to the aforesaid Instrumentalities of the United States and not to defendants and the collection thereof constitutes an unjust enrichment to the defendants at the

expense of the aforesaid Instrumentalities of the United States.

25. Regulation 22, as applied to purchases by the aforesaid Instrumentalities of the United States, is illegal and void and is prohibited by the Constitution of the United States because: (a) it is in conflict with the procurement policy established for Instrumentalities of the United States by the Secretary of Defense pursuant to authority vested in him by an Act of Congress; (b) it invades and interferes with the exercise of powers expressly delegated by the Constitution of the United States to the Congress; (c) it infringes the Federal Government's immunity from taxation by the States; and (d) the State of Mississippi is without jurisdiction to apply its laws to the lands upon which the aforesaid Instrumentalities of the United States are situated.

WHEREFORE, the United States respectfully prays that:

1. In accordance with 28 U.S.C. 2284(1), this Court immediately notify the Chief Judge of the United States Court of Appeals for the 5th Circuit that this is an action to restrain the enforcement of an order made by an administrative board or commission acting under state statutes upon the ground of unconstitutionality within the meaning of 28 U.S.C. 2881, and request him to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

2. Upon hearing of this action, Regulation 22 be declared null and void and defendants, their officer, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be enjoined and restrained from regulating, taxing or controlling purchases of alcoholic beverages by Instrumentalities of the United States, aforementioned hereinabove, located in the State of Mississippi, either directly or indirectly through distillers and/or suppliers doing business with the United States.

3. Upon hearing of this action, there be a judgment in favor of the United States of America and against all defendants jointly and severally in the sum of $319,740.51 with interest according to law until paid, which sum has heretofore been paid under protest to defendants directly or indirectly as alleged; and there be a further judgment

in favor of the United States of America and against defendants jointly and severally in a sum certain equal to the amount which the aforesaid Instrumentalities of the United States may pay in the future to defendants under protest directly or indirectly in excess of the $319,750.51 already paid to date as stated hereinabove.

/s/ Robert E. Hauberg
United States Attorney
/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

VERIFICATION

City of Washington
District of Columbia } ss

Major Thomas V. Ball, being duly sworn, deposes and says:

That he is an air force officer on active duty, assigned to the Office of the Judge Advocate General, United States Air Force; that he is authorized to act herein and to make verification on behalf of plaintiff herein; that in accordance with the duties of his office, he has read the foregoing complaint and that the matters therein alleged are true as affiant is informed and verily believes.

/s/ Major Thomas V. Ball

Subscribed and sworn to before me this 14th day of October, 1969.

/s/ Audrey Anne Crump
Notary Public
My commission expires Aug. 31, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed November 3, 1969]

[TITLE OMITTED IN PRINTING]

APPLICATION FOR CONVENING OF THREE-JUDGE DISTRICT COURT

Plaintiff, the United States of America, upon the complaint heretofore filed, hereby makes application for hearing of this cause and of the plaintiff's motion for a permanent injunction herein before a three-judge district court as required by Section 2284(1), Title 28, United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiff's application for injunction in order that necessary designation of judges for said Court may be made.

/s/ Robert E. Hauberg
United States Attorney

/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed May 12, 1970]

[TITLE OMITTED IN PRINTING]

ANSWER

Come now all of the Defendants in this cause and file their Answer to the Complaint exhibited against them.

I.

The Defendants admit the allegations contained in Paragraph 1 of the Complaint.

II.

The Defendants admit the allegations contained in Paragraph 2 of the Complaint.

III.

The Defendants admit the allegations contained in Paragraph 3 of the Complaint.

IV.

The Defendants deny the allegations contained in Paragraph 4 of the Complaint.

V.

The Defendants admit the allegations contained in Paragraph 5 of the Complaint.

VI.

The Defendants admit that the clubs named in Paragraph 6 of the Complaint operated with non-appropriated funds, are located in the State of Mississippi, are engaged in the purchase of alcoholic beverages for resale, but deny that they are operated as instrumentalities of the United States and are thereby entitled to the sovereign immunities and privileges of the United States.

587-894 O - 75 - 3

VII.

The Defendants admit that *50 USC App. 473* authorizes the Secretary of Defense to make regulations but denies that the statute authorizes the Secretary of Defense to make any regulations concerning intoxicating liquors that require conduct in violation of state law.

VIII.

The Defendants admit that Department of Defense Directive No. 1330.15, dated 4 May 1964, 32 CFR 261.4(c), has been issued but deny that it can be interpreted to authorize the purchase of alcoholic beverages for resale at any location within the United States without violating the Twenty-First Amendment to the United States Constitution.

IX.

The Defendants admit the allegations in the first sentence of Paragraph 9 of the Complaint but deny that the Secretary of Defense has the authority to extend the provisions of the Armed Services Procurement Act to the procurement of alcoholic beverages with non-appropriated funds. The Defendants also deny that the military bases referred to in the Complaint are instrumentalities of the United States.

X.

The Defendants deny the allegations of Paragraph 10 of the Complaint.

XI.

The Defendants admit the allegations of Paragraph 11 of the Complaint.

XII.

The Defendants admit the allegations of Paragraph 12 of the Complaint but deny that the clubs referred to in Paragraphs 4 and 5 of the Complaint are instrumentalities of the United States.

XIII.

The Defendants admit the allegations of Paragraph 13 of the Complaint but deny that Regulation 22 attempts to regulate tax and control instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

XIV.

The Defendants admit that Regulation 22 requires clubs to purchase alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the State Tax Commission but denies that the clubs are instrumentalities of the United States.

XV.

The Defendants admit the allegations of Paragraph 15 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVI.

The Defendants admit the allegations of Paragraph 16 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVII.

The Defendants deny the allegations of Paragraph 17 of the Complaint.

XVIII.

The Defendants deny the allegations of Paragraph 18 of the Complaint.

XIX.

The Defendants deny the allegations of Paragraph 19 of the Complaint.

XX.

The Defendants deny the allegations of Paragraph 20 of the Complaint.

XXI.

The Defendants admit the allegations of Paragraph 21 of the Complaint.

XXII.

The Defendants deny the allegations of Paragraph 22 of the Complaint.

XXIII.

The Defendants deny the allegations of Paragraph 23 of the Complaint.

XXIV.

The Defendants deny the allegations of Paragraph 24 of the Complaint.

XXV.

The Defendants deny the allegations of Paragraph 25 of the Complaint.

XXVI.

The Defendants deny that the Plaintiff is entitled to any relief, injunctive or otherwise, based on the allegations of the Complaint and deny that the Plaintiff is entitled to a judgment against the Defendants, jointly or severally, in the sum of $319,740.51, or in any amount.

Respectfully submitted this the 21st day of May, 1970.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMY WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, Defendants.

By: /s/ Guy N. Rogers
GUY N. ROGERS,
Assistant Attorney General
One of the Attorneys for Defendants

/s/ Taylor Carlisle
TAYLOR CARLISLE,
Attorney for the State Tax Commission

/s/ James E. Williams
JAMES E. WILLIAMS,
Attorney for the State Tax Commission

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed September 8, 1970]

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S ANSWER TO DEFENDANTS' INTERROGATORIES

Major David M. Lewis, Jr., an Air Force officer, assigned to the Litigation Division of the Office of the Judge Advocate General, United States Air Force, being duly sworn, deposes and says that the following Answers to Defendants' Interrogatories are true to the best of his knowledge, information and belief.

• • • • •

3. As to each of the fourteen alleged federal instrumentalities named in paragraph 6 of the complaint:

(a) When were each of these clubs established and by what authority?

ANSWER: (1) *Keesler Air Force Base:* Under the authority of Air Force Manual 176-3, Airmen's Open Mess, established January 12, 1951; Officers' Open Mess, established December 7, 1941; NCO Open Mess, established July 4, 1946.

(2) *Columbus Air Force Base:* Although available records do not provide a specific date, the Officers' Open Mess, and the Noncommissioned Officers' Open Mess, were established sometime between 1951 and 1956 under the authority of Air Force Manual 176-3.

(3) *United States Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), established April 29, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter reference PERS-G12 MEB, March 30, 1966; Chief Petty Officers' Mess (Open), established July 18, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter, reference PERS-G12 MEB dated July 18, 1966; Navy Exchange Package Store, established October 20, 1967, in accordance with authority granted by the Secretary of the Navy by letter

dated October 20, 1967; Enlisted Men's Club, established as an integral part of the Navy exchange, February 21, 1967, in accordance with the Navy Exchange Manual.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club, established in 1961 on the approval of the Navy Resale System Office; Chief Petty Officers' Mess, established April 1961; Commissioned Officers' Mess (Open), established October 6, 1960, by authority of the Chief of Naval Personnel. The Commissioned Officers' Mess (Closed) purchases no liquor independently and procures wine from the Commissioned Officers' Mess (Open). The Centralized Package Store was discontinued in 1967.

• • • • •

(e) Is club membership confined to members of the Armed Forces on active duty or does it include members of the Reserve Components, Reserve and National Guard, and retired members of the Armed Forces and of the Reserve Components?

ANSWER: (1) *Keesler Air Force Base:* Membership can be obtained in the Officers' Open Mess by active duty personnel and their widows, and by retirees and their widows. Membership is not available to retired reservists. Members of the National Guard and reservists can apply for membership, but their applications must be approved on an individual basis by the Advisory Council before becoming a member.

Membership can be obtained in the NCO Open Mess by active duty personnel and their widows, retirees and their widows, and by retired reservists and their widows. Memberships are not available to members of reserve components or the National Guard.

Membership can be obtained in the Airmens' Open Mess by active duty personnel and their widows, and by personnel (and their widows) medically retired from active duty. Those who cannot obtain membership in the Airmens' Open Mess are members of reserve components and the Reserve and National Guard. All enlisted personnel in Grades E-1 to E-3 of all services in temporary duty, detached duty, or in transit status at Keesler Air Force Base can become Associate Members.

(2) *Columbus Air Force Base:* The Officers' and NCO Clubs both allow membership to personnel of Reserve units not on active duty and to retired members of the Armed Forces.

(3) *Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), the Chief Petty Officers' Mess (Open), and the Navy Exchange Package Store do not operate on a membership basis as such. The privileges and services of each instrumentality are available depending upon the status of the individual concerned as determined by Naval Regulations, Directives, Instructions and Manuals. The services and privileges of each instrumentality are available to members of reserve components and National Guard on active duty for 72 hours or more, and to retired members of the Armed Forces on the retired list with pay, including members of the Fleet Reserve and Fleet Marine Corps Reserve on active duty. Inactive reserve personnel performing scheduled periods of inactive duty training drills do not have Package Store privileges.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club membership is open to personnel of the Armed Forces on active duty, reserve components, reserve and National Guard and retired military personnel.

The CPO Mess membership is open to all Chief Petty Officers on active duty stationed at the Naval Air Station at Meridian.

Commissioned Officers' Mess (Open) membership is limited to members who are either active duty military, retired military, officers of the U.S. Environmental Science Services Administration and the U.S. Public Health on active duty or on the retired list with pay, or unremarried widows of officers of the Armed Forces of the United States who died while on active duty or on retired list with pay.

• • • • •

(h) Are the clubs open to any persons other than military personnel?

ANSWER: In addition to those members listed in the Answer to Interrogatory 3(e) above, clubs are open to their dependents and guests. However, guests are

not allowed to make any purchase or share in any expense incurred by their hosts.

• • • • •

(s) When did the clubs commence purchasing alcoholic beverages for resale in packaged form?

ANSWER: (1) *Keesler Air Force Base:* The Package Store which operates under the Officers' Open Mess began operation in November 1956; the Package Store which operates under the NCO Open Mess began operation in November 1957; the Airmens' Open Mess never has had a package store operation.

(2) *Columbus Air Force Base:* The Officers' Club and the NCO Club commenced purchasing alcoholic beverages for resale in package form in January 1957.

(3) *U. S. Naval Construction Battalion Center:* The Chief Petty Officers' Mess (Open) commenced purchasing alcoholic beverages for resale in packaged form after April 17, 1970. (the Secretary of the Navy had previously authorized the establishment of such sales outlets at the Naval Construction Battalion Center by letter dated October 20, 1967); the Navy Exchange Package Store commenced purchasing alcoholic beverages for resale in packaged form during November 1967 and commenced selling alcoholic beverages in packaged form during December 1967; the Commissioned Officers' Mess (closed) and the Enlisted Mens' Club do not purchase alcoholic beverages, other than beer, for resale in packaged form.

(4) *Naval Air Station, Meridian:* The Enlisted Mens' Club has purchased liquor for resale in packaged form since 1961; the CPO Mess was authorized to resume individual package store sales on September 6, 1968 (club records do not show authorization prior to that date); the Commissioned Officers' Mess (Open) purchased alcoholic beverages for resale in packaged form from March 1, 1962, to March 31, 1967 and commenced the sale of packaged liquor again on August 30, 1968.

• • • • •

(x) Were sales confined to members of the United States Armed Forces?

ANSWER: In accordance with applicable regulations, sales were generally confined to active duty personnel

567-894 O - 75 - 4

and their widows, and retirees and their widows of the United States Armed Forces, and in exceptional circumstances, to military personnel of foreign armed forces stationed at the installation for training purposes.

• • • • •

/s/ David M. Lewis, Jr.
DAVID M. LEWIS, JR.
Major, United States Air Force,
Litigation Division, Office of the
Judge Advocate General, USAF.

Subscribed and sworn to before me this 2nd day of September, 1970.

/s/ Angeline Johns
Notary Public

My Commission expires April 14, 1972

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed February 4, 1971]

Now come the defendants herein by their attorneys and move the Court for an entry of a summary judgment dismissing the complaint with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure. The grounds of the motion are that the admissions on file in the complaint and in the plaintiff's answers to interrogatories show that there is no genuine issue as to the material facts. These facts may be summarized as follows:

A. AS TO THE CLAIM FOR A MONEY JUDGMENT

1. The indirect payments plaintiff seeks to recover were made out of non-appropriated funds and passed on by the military clubs and messes making them to their alcoholic beverage customers.

2. These payments were directly made by suppliers to the Mississippi State Tax Commission as a condition of selling alcoholic beverages to Mississippi customers.

B. AS TO THE CLAIM THAT MISSISSIPPI'S COLLECTION OF ITS WHOLESALE MARK-UP ON SALES TO MILITARY RETAIL OUTLETS VIOLATES THE UNITED STATES CONSTITUTION

1. There is no federal legislative authority for conducting a military alcoholic beverage business free of state imposed requirements on purchases made for resale.

2. Since June 6, 1966, there has been no federal administrative authority for conducting such a business without complying with state laws controlling such purchases.

3. The transactions in question all require the transportation of alcoholic beverages within the State of Mississippi and are, therefore, subject to paragraph 2 of the 21st Amendment to the United States Constitution.

The factual grounds and legal arguments supporting

this motion are more fully set forth in the attached memorandum.

Respectfully submitted,
A. F. SUMMER, ATTORNEY GENERAL

BY:
/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General
Attorney for Defendants

/s/ James E. Williams
JAMES E. WILLIAMS
/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorneys for the Mississippi State Tax Commission

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

[Filed September 28, 1971]

Now comes the plaintiffs in the above entitled action by their attorney to oppose defendants' motion for summary judgment and to move the court for an entry of summary judgment pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts. The basis of the cross motion and the opposition to defendants' motion is that the answer to the complaint of the plaintiff by the defendant, defendants' answers to the interrogatories posed by the plaintiff, and the stipulation of facts between plaintiff and defendants indicate that the allegations set forth in the complaint of the United States of America have not been refuted, that there is no genuine issue as to any material fact, and that therefore the plaintiff, United States of America, should be granted summary judgment, and entitled to the judgment prayed for in the complaint as a matter of law.

The issues upon which the cross motion of the plaintiff for summary judgment is based may be particularized as follows:

A. The State of Mississippi's regulatory scheme for collecting "markups" from the military clubs burdens the exercise by the United States of its constitutional powers to maintain the Armed Services.

B. The State of Mississippi through the enforcement of the "markups" imposed by Regulation 22, has unlawfully levied a tax on governmental instrumentalities of the United States.

C. The state law and its implementing regulations have no force and effect in areas over which the United States Government has acquired exclusive jurisdiction (Keesler Air Force Base and United States Naval Construction Battalion Center.)

The factual basis and substantive legal arguments and citations supporting this cross motion and opposing defendants' motion are more fully set forth in the attached memorandum of law in support of plaintiff's cross motion for summary judgment and in opposition to defendants' motion for summary judgment.

Respectfully submitted,
/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney
Southern District of
Mississippi
Jackson Division
By: /s/ Joseph E. Brown, Jr.
JOSEPH E. BROWN, JR.
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

[Filed September 22, 1971]

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which, comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secre-

tary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.,* Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County, Mississippi, Mrs. Anna J. Ott, et al.,* Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.,* Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess —open, Navy Exchange Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

> Subject: Alcoholic Beverage Control.
> References:
> (a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.
> (b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).
> (c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).
>
> I. AUTHORITY AND PURPOSE
>
> Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.
>
> II. APPLICABILITY AND SCOPE
>
> The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

567-894 O - 75 - 5

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Department which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recreation, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all

alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for packaged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of a Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations and findings made in accordance with the criteria as stated above.

3. *Controls*

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to unauthorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. *Eligibility for patronage of sales outlets*

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ADS (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

> The following pen change to DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately:*
>
> *PEN CHANGE* to *Page 2, Section IV.C.1:* Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Di-

rector, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22, entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966," which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%.

This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of

their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed the Paragraph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.

You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended,* therefore, all provisions remain in force and shall be strictly adhered to:

REGULATION No. 22

SALES TO MILITARY POST EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an

order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers," on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

> Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*
>
> If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.
>
> Yours very truly,
>
> /S/ A. V. BEACHAM, M.D.,
> A. V. BEACHAM, M.D., Director,
> Alcoholic Beverage Control Division,
> State Tax Commission.
>
> AVB:am
> (Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permit, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other nonappropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34-57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176-1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176-3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base:* Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base:* Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center:* Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales), $20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian:* Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers' Mess open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

"5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?

Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the surrounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the

wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from a morale standpoint that each installation furnish substantially similar off-duty facilities for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

/s/ Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff, United States of America.

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General for the State of Mississippi.

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant, State Tax Commission of the State of Mississippi.

BEST COPY AVAILABLE

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

[seal]

15 April 1966

MANPOWER

MEMORANDUM FOR Secretaries of the Military Departments

Recently, at their request, I conferred with the representative of the Association of Control States and members of the State Control Boards of several States. Mr. Charles B. Buscher, Executive Director of the National Alcoholic Beverage Control Association, Inc., requested that the Department of Defense policy concerning control of alcoholic beverages be changed to provide that military installations located in Control States would purchase their alcoholic beverages from the State wholesale distributors. He stated that all of the Control States except Montana and Oregon have now amended their laws to permit a discount to the military installations. This was strongly endorsed by all of the State representatives present at the meeting, and assurances were given that they would negotiate with the military installation representative and agree to a price which would result in a fair and reasonable profit to the installations. This was urged as a means of effecting better control of alcoholic beverages in their States and minimize alleged diversion to unauthorized persons.

It was also brought out at the hearing that a bill had been submitted by the Association and introduced in Congress which would compel the installations in the Control States to purchase the liquor from these States. They further stated that they would much prefer to work out an agreement with the Defense Department as indicated above rather than press for the bill. Failing to secure such agreement, they indicated that they would seek to have the bill passed by the Congress and said they were confident that sufficient support could be elicited to attain passage. After a full discussion, I advised them that I would look into the matter further.

Before any conclusion is made with respect to this proposal, I would appreciate your comments on the following statement which if approved will be reflected in the present DoD Directive.

"In all of the seventeen (17) Control States, frequently referred to as Monopoly States, except Montana and Oregon, military installations located within such States having separate package liquor stores on said installations will not purchase alcoholic beverages from any source other than the State wholesale distributors until they have contacted the appropriate officials within the State and undertaken negotiations as to price. If a mutually agreed upon price has been arrived at, the installations will purchase their alcoholic beverages exclusively from the State. Where there is no package liquor store on an installation, the foregoing is optional and the purchases may be made from other sources providing deliveries can be made to the installation in consonance with the law.

Since price is only one factor in determining the most advantageous contract for the Government, a price which is mutually agreed upon and which results in an adequate profit to the installation is a satisfactory implementation of the policy of Section IV.C.1 of DoD Directive 1330.15 even though a lessor price might be secured from a private source outside of the State involving inconvenience inherent in transactions and shipments from a distant source."

Your comments are requested not later than 22 April 1966.

Thomas D. Morris

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350

[seal]

22 April 1966

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

Subj: Proposed change to Department of Defense Directive No. 1330.15 (Alcoholic Beverage Control)
Ref: (a) ASTSECDEF (Manpower) memo of 15 Apr 1966
Encl: (1) Purchasing of distilled spirits from monopoly states
(2) Potential additional costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Reference (a) advised that the National Alcoholic Beverage Control Association had requested that the Department of Defense require that military activities in control states (the seventeen "monopoly" states) purchase their alcoholic beverages from the State liquor authorities. It was alleged that this would result in better control of alcoholic beverages in these States and minimize alleged diversion to unauthorized persons.

This Association has made similar requests several times in the past. However, in sympathy with strong objections from the military services, acquiescence has not been granted. The Secretary of the Navy again objects to submitting to the request of this Association, the membership of which is composed of ABC Board members in the seventeen control states. Furthermore, it is highly doubtful that legislation subjecting Federal Government instrumentalities to the state controls proposed by the Association would advance any further this year than it has in past years.

In accordance with sound business practices, most Navy Messes and Clubs have for over thirty years been purchasing their alcoholic beverage requirements directly from prime sources, the distillers. Distillers' representatives make frequent calls, give advice and assistance, and expedite shipments directly from the factory or regional warehouses. Prices are at or near the minimum prices paid by

the control states, and these very reasonable prices apply to all orders regardless of size. It would be impossible to have any lower prices or any more convenient method of purchase than this.

Military activities enforce strict regulations to preclude diversion to unauthorized purchasers. The decalcomanias provide positive identification of each and every bottle; the signed sales slip with pledge not to resell is a further check. The 1964 DOD regulation establishing military package store sales prices within 10% of outside prices further minimizes the temptation to engage in illicit commerce. There is no evidence that there are any better "controls" in the States of Oregon, Washington, and Michigan (where we are now forced to buy from State stores) than elsewhere. On the contrary, those States exact a markup of from 30 to 70% over the cost to military activities elsewhere. This increases the operating costs of the Messes and Clubs in those States by a tremendous amount. The results are high prices of drinks and packaged goods to military personnel, lack of profits for Mess maintenance and improvements, and a deleterious effect upon military morale.

Enclosure (1) delineates today's purchasing procedures in the control states, based upon data provided by the Distilled Spirits Institute. Discounts to the military from the State store retail price are: Michigan, 22% and without tax of 8%; Oregon, none; Washington, 27%. Thus, the net markups over costs to State stores imposed upon military Messes are estimated to be: Michigan, about 30%; Oregon, about 70%; and Washington, about 45%.

If it were assumed that we could reach price agreements with the other five control states in which Navy and Marine Corps activities are located and if these State Control Boards offered a markup of only as little as 30%, the additional annual costs to the fourteen Navy and Marine Corps activities in the five states would exceed $2,750,000. Refer to enclosure (2).

In summary, it is recommended that the proposed change to DOD Directive No. 1330.15 not be made and that the pressures from the National Alcoholic Beverage Control Association continue to be resisted strongly. Military Mess purchasing methods of long standing are in accord-

ance with the free enterprise system, sound business practices, and DOD purchasing policies. The proposed change would provide no advantages to the military. The increased costs would be extremely detrimental to morale.

/s/ Robert H. B. Baldwin
ROBERT H. B. BALDWIN
Under Secretary of the Navy

Purchasing of Distilled Spirits from Monopoly States

State	State Liquor Board Markup on Cost	Discount to retail licensees	How Purchased Now by Military Activities
Alabama	68.0%	5%	Shipments to military from outside state are permitted.
Idaho	66.5%	5%	Unknown.
Iowa	50.9%	?	Shipments to military from outside state are permitted.
Maine	45.5%	?	Navy receives all shipments from outside state. No objections.
Michigan	63.2%	12½% not including 8% tax	Military activities must buy from State liquor stores. Discount is 22% not including 8% tax.
Montana	60.5%	?	Unknown.
New Hampshire	32.1%	5%	Navy receives all shipments from outside state. No objections.
North Carolina	42.5%	No on-sale licenses	Shipments to military from outside state are permitted.
Ohio	50.3%	10%	Shipments to military from outside state are permitted.
Oregon	69.5%	?	Military activities must buy from State liquor stores, with standard markup and no discount at all.
Pennsylvania	79.4%	16⅔%	Navy receives all shipments from outside state. No objections except for one small base which is not fully ceded.
Utah	62.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Vermont	38.4%	2%	Shipments to military from outside state are permitted.
Virginia	44.0%	No on-sale licenses	Navy receives all shipments outside state. No objections.
Washington	77.0%	17.5%	Military activities must buy from State liquor stores. Discount is 27%.
West Virginia	59.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Wyoming	19.1%	?	Shipments to military from outside state are permitted.

Enclosure (1)

Potential Additional Costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Maine	$59,445
New Hampshire	66,015
North Carolina	406,445
Pennsylvania	426,186
Virginia	1,827,904
	$2,785,995

Enclosure (2)

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

[seal]

26 April 1966

MEMORANDUM FOR: ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Alcoholic Beverage Procurement

This memorandum provides comments on the changes to DOD Directive 1330.15 proposed in your memorandum of 15 April 1966, which would encourage procurement of alcoholic beverages by the military services from wholesale distributors of the Control or Monopoly States, except Montana and Oregon.

The net effect of the policy change would be to encourage procurement of alcoholic beverages in fifteen (15) states, at prices established by the states, instead of in a competitive, free market. This would reduce the margin of allowable profit accruing to officers' and NCO open messes, or otherwise require selling price increases. The proposal is contrary to the current policy that procurement by nonappropriated fund activities shall be in the open market, to the best advantage of the procuring activity, and by a method of purchase deemed to be the most favorable to the Government. There would be no objection to a provision whereby the wholesale distributors of Control (Monopoly) States would be given the opportunity to quote prices in free competition with private supply sources.

It is strongly recommended that the proposed change to DOD Directive 1330.15 quoted in your memorandum not be adopted. As an alternative, the following change is proposed:

> "It is the policy of the Department of Defense that alcoholic beverages procured for sale and consumption in authorized resale outlets pursuant to this Directive, be procured at the lowest prices, irrespective of source, consistent with the preferences of authorized patrons. Additional transportation and handling costs of procurement from a distant supply source, should be considered in order to insure that the landed cost at the point of sale is in fact the lowest cost of goods sold.
>
> "Procurement officers within the United States will obtain quotations from the wholesale distributors of Control (Monopoly) States in which delivery is to be made, in determining the most advantageous source of alcoholic beverages procured for sale and consumption at Armed Services installations."

/s/ Arthur W. Allen, Jr.
ARTHUR W. ALLEN, JR.
Deputy Under Secretary of the Army
Manpower

DEPARTMENT OF THE AIR FORCE

WASHINGTON

OFFICE OF THE UNDER SECRETARY

April 26, 1966

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Procurement of Alcoholic Beverages in Control States

Reference is made to your memorandum of 15 April 1966 concerning the above subject.

The proposed addition to DOD Directive 1330.15 strongly implies that non-appropriated fund activities should buy alcoholic beverages from state wholesale distributors in the specified states even though their prices may be higher than prices on the open market. Economically operated open messes are among the most important fringe benefits which contribute to our retention program.

The Air Force opposes any directive which would restrict negotiating for the best possible price consistent with the laws of the various control states. We believe that DOD should take no action to limit the gains which could accrue to the best advantage of non-appropriated fund activities, including open messes. In its' non-appropriated fund procurements the Air Force, as a general rule, prefers to follow the Armed Services Procurement Regulation policy of maximum competition. We believe that the proposed addition to the Directive would not be consistent with the principle that all procurements should be on a competitive basis to the maximum practicable extent.

At the present time there are differing agreements with the various states. In some instances states permit the Air Force non-appropriated fund activities to make the most profitable arrangements for the purchase of alcoholic beverages from wholesalers. Others are much more limiting and it appears that the Association of Control States desires to impose greater limitations and to force us to buy from the control states even when their prices are not competitive.

We believe the proposed directive would confuse the issue and set the stage for further controversy.

We recognize that the proposed directive is designed to prevent legislation which would require our non-appropriated fund activities to purchase from certain state wholesalers regardless of price. We do not believe the revised directive would over a long period of time preclude an attempt at such legislation. Nevertheless, if legislation is pursued by the interested states, the DOD should oppose it. There is a good chance the legislation will not be pursued, or if pursued, will not be enacted.

For the above reasons, the Air Force believes the proposed statement should not be incorporated into DOD Directive 1330.15.

/s/ Norman S. Paul
NORMAN S. PAUL
Under Secretary of the Air Force

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

3 May 1966

[seal]

MANPOWER

MEMORANDUM FOR MR. MORRIS

SUBJECT: Proposal of the Control States Association

In view of the strong opposition of the Department of the Navy and Air Force, it is recommended that this office not approve the proposal submitted to the Military Departments for coordination by this office. While the Army's report also opposes the proposal as submitted, it does recommend a substitute. While this counter-proposal is a satisfactory one, if it were decided to make such a change in the Directive, it would undoubtedly meet the same opposition from the other Departments as the proposal that was sent to them for coordination.

As an alternative, it is recommended that the Directive be changed to delete the last clause in Section IV.C.1 of the Directive which states, ". . . without regard to prices locally established by state statute or otherwise." As you recall, this clause was specifically objected to by the Chairman of the Pennsylvania Alcoholic Beverage Control Board. Its deletion would not require negotiation with the Monopoly States' authorities nor would it preclude it. If you agree, I think we could expeditiously get at least a "no objection" from the other Military Departments. I have discussed this, together with other factors involved, with General Lampert and he concurs in this suggestion, subject to your approval.

If you approve, I will prepare the necessary papers to effect this, including a letter to Mr. Buscher.

/s/ Steve
STEPHEN S. JACKSON

8 JUN 1966

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Several representatives of the Control States Association and the Executive Director of the National Alcoholic Beverage Control Association met with me recently at their request. All of the members complained of alleged diversion of alcoholic beverages to unauthorized persons in their states. They urged that the Department of Defense require that military installations located in Control States purchase their alcoholic beverages exclusively from the state wholesale distributor. They pointed out that 15 of these states had modified their laws to give discounts to the military and that they would negotiate and agree to prices which would result in a fair and reasonable profit to the installations. This was advocated as a means of effecting control and preventing diversion. It was proposed as an alternative to legislation submitted by them to Congress which would require all purchases to be made from the Control States. Although alleging widespread diversion, they declined to give information which would permit an investigation and appropriate action if substantiated.

I sent a memorandum to the three Secretaries emphasizing the necessity of persistent monitoring of the DoD policy and Service regulations designed to prevent diversion to unauthorized persons.

This was followed by a memorandum from this office outlining the proposal and requesting comments. The Air Force and the Navy reported unqualified opposition to it. The Army objected to it but proposed an alternative which would require procurement officers for installations within the Control States to obtain quotations of prices which would be considered along with the prices from other sources.

In lieu of the proposal submitted to the Department, I suggest the following change in our Directive, a copy of which is attached. On page 2, Section IV.C.1, delete the last clause, ". . . without regard to prices locally established by state statute or otherwise." While I am sure the Control States would want to go much further, this lan-

guage was particularly objected to by the Chairman of one of the Alcoholic Beverage Control Boards.

Its deletion would not require nor would it preclude negotiation with the states for the most advantageous contract to the Government.

Informal coordination with the three Departments resulted in approval by Navy and Air Force. The Army non-concurs on the basis that deletion could be misunderstood and might result in litigation. AGC(M) has no objection to the suggested change to the Directive. He notes that the legal posture of DOD would not be affected.

Recommend signature of the attached memorandum.

Thomas D. Morris

Attachments
2nd page revised by LtGenJBLampert/vlm/7Jun66
cc: OASD(M) Files
ASD(M)

9 JUN 1966

MEMORANDUM FOR The Assistant Secretary of Defense (Administration)

SUBJECT: Deletion of Clause in DoD Directive 1330.15, May 4, 1964

Please amend DoD Directive 1330.15 by making the following deletion:

Page 2, Section IV.C.1, the last clause

"without regard to prices locally established by state statute or otherwise."

This change is effective immediately. Action addressees should be requested to submit two copies of revised implementing regulations to the Assistant Secretary of Defense (Manpower) within thirty days.

Deputy

27 JUN 1966

Mr. Charles B. Buscher
Executive Director, National Alcoholic
Beverage Control Association
1000 Connecticut Avenue
Washington, D. C. 20036

Dear Mr. Buscher:

I regret the delay in sending this letter due to matters of paramount importance, including a trip to South Vietnam.

Since my conference with you and the members of your Association, I have studied the comments of the military departments on the proposal recommended by your group. I have also given careful consideration to the allegations of widespread diversion to unauthorized persons of alcoholic beverages purchased at military outlets.

As to the matter of diversion, I can assure you that this is a matter of continuing supervision in all of the military departments through the chain of command from the Secretary to the field. I know that the Secretaries of the military departments have recently addressed themselves to this matter of possible diversion. I am enclosing a recent Newsletter from the Navy. I should point out that we can act on specific allegations of diversion by authorities of an Alcoholic Beverage Control Board only if such details are revealed that would permit Departments to take appropriate action.

As to your proposal, the opposition from the Services is such as to convince me that its adoption is not in the best interest of the military departments.

However, in our desire to cooperate with the sovereign states of the Control Group, we have decided to delete the last clause in Section IV.C.1. of DoD Directive 1330.15 (attached). This would meet the specific objection of your group as submitted by the Chairman of the Pennsylvania ABC Board. It would also remove any possible implication that negotiation with a state official must be avoided.

Sincerely,
Thomas D. Morris

SSJackson/gsc/jg/18 Jun 66
3D-281/79158

Enclosures
(M) Chron File
(M) Reading File
Mr. Jackson

SUPREME COURT OF THE UNITED STATES

No. 72-350

UNITED STATES, APPELLANT,

v.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

APPEAL from the United States District Court for the Southern District of Mississippi.

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted.

November 13, 1972

United States District Court, Southern District of Mississippi, Jackson Division

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, CHAIRMAN; JIMMIE WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALOCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Supplemental Stipulation

It is hereby stipulated between counsel for the Plaintiff and for the Defendants, respectively, that the two printed pages attached to this stipulation are true copies of the pages of the Navy Exchange Manual that contain the sections cited in the briefs on remand. These are, section 2634 Sales and Use Taxes, cited at page 5 of the Defendants' brief and at pages 19–20 of the Plaintiff's brief; and sections 2614 State and Local Taxes 2632 License Taxes, 2633 Property Tax, 2635 Other Excise Taxes and 2636 State and Local Income Taxes, cited at page 20 of the Plaintiff's brief.

WILLIAM H. FRAKE,
Counsel for Plaintiff.
ROBERT T. WRIGHT,
Counsel for Defendant.

PART F—TAXES

SECTION I GENERAL

2611 SCOPE

The treatment of taxes in this manual is limited to the application of federal, state, and local taxes to Exchange activities which operate with non-appropriated funds. Since the rates of tax are changed frequently, they are not given. All questions relating to any tax will be referred to the Navy Resale System Office.

2612 LEGAL STATUS

Exchange activities, as stated in par. 1212, are instrumentalities of the Government, deemed essential for the performance of governmental functions, and are entitled to whatever immunities the Department of the Navy may have under the Constitution and statutes. The Supreme Court has held that Army Post Exchanges are governmental instrumentalities. (Standard Oil Co. of California vs. Johnson, 316 U.S. 481 (1942)). This ruling, by analogy, applies equally to Navy Exchanges.

2613 FEDERAL TAXES

The Federal Government may tax itself or its instrumentalities if it so desires. However, the intent to do so must be stated clearly in the applicable Federal tax statute. Exchanges, therefore, are not subject to a Federal tax, unless the statute imposing it provides expressly that it applies to Exchanges or to instrumentalities of the Federal Government. Examples of specific Federal taxes made applicable to Exchanges are the Federal Occupational Taxes and the Social Security Taxes.

2614 STATE AND LOCAL TAXES

The taxing authorities of a state, territory, the District of Columbia, or a locality may not impose any tax directly upon the U.S. Government or any of its instrumentalities, unless authorized to do so by an act of Congress. The Federal Government permits state, territory, and District of Columbia gasoline taxes upon the sale of gasoline by Exchanges to authorized patrons for their private use. For more specific applications of state and local taxes, see pars. 2631-2636.

2615 TAXES IMPOSED ON SUPPLIERS AND CONTRACTORS

Federal and state taxes may be imposed on contractors and suppliers who have dealings with Exchanges. When the legal incidence of the tax is not on the Exchange, the constitutional immunity of the Exchange as a U.S. Government instrumentality does not apply. The Exchange, in the case of a tax on contractors or suppliers, would eventually bear the economic burden of the tax in the form of increased cost of the supplies purchased, unless an exemption were provided by the taxing authority. However, this economic burden does not invalidate the tax.

SECTION II SPECIFIC FEDERAL TAXES

2621 MANUFACTURERS EXCISE TAX

1. APPLICABILITY

Exchanges located in the United States (the 50 states and the District of Columbia) must purchase articles, to which the Manufacturers Excise Tax applies, at a price inclusive of such tax. If the Exchanges import into the United States articles to which this tax applies, the Exchanges must themselves pay the tax. This tax is included in the price of the articles, or is payable by the Exchange directly, regardless of whether such articles are purchased for Exchange use or for resale. The Manufacturers Excise Tax is applicable to the following:

1. motor vehicles, parts, and accessories;
2. tires and inner tubes;
3. gasoline;
4. lubricating oil;
5. recreational equipment--sporting goods:
   fishing equipment;
   firearms, shells, and cartridges.

2. EXPORT EXEMPTION

a. Exemption From the Manufacturer. Excise Tax

Exemption from the Manufacturers Excise Tax is available with respect to the purchase of supplies for export to a foreign country or for shipment to a possession of the United States. The Internal Revenue Code presently provides that no tax will be imposed on the sale by the manufacturer of an article "for export or for resale by the purchaser to a second purchaser for export"; however, proof of such exportation or shipment to a possession of the United States will be furnished to the manufacturer within the six-month period which begins on the date of the sale by the manufacturer (or, if earlier, on the date of shipment by the manufacturer). Accordingly, purchases of taxable articles for resale in Exchanges located in foreign countries and possessions will be made on a tax exempt basis. The foregoing exemption is available whether the articles are being purchased for an Exchange's own use or for resale by the Exchange. The Exchange, as a purchaser for export, is required to register with Internal Revenue Service.

BEST COPY AVAILABLE

whether or not any of these employees hold another position with the Government with respect to which they are contributing to a retirement plan. The Social Security Act applies to the following Exchange employees:

1. civilian employees of Exchanges who are citizens of the United States, regardless of where they are employed; an individual who is a citizen of Puerto Rico, but not otherwise a citizen of the United States, will be considered, for purposes of the Federal Insurance Contributions Act Tax, as a citizen of the United States;

2. civilian employees, who are not citizens of the United States, if they are employed in the United States (the 50 states and the District of Columbia), Puerto Rico, the Virgin Islands, Guam, and American Samoa.

The Federal Insurance Contributions Act does not apply to civilian employees who are not citizens of the United States, and who are employed in foreign countries and United States possessions, other than those listed in item 2. Furthermore, the Federal Insurance Contributions Act does not apply to civilian employees of Exchanges located in Guam when the employee is a resident of the Republic of the Philippines, and has been admitted to Guam as a nonimmigrant alien, pursuant to the Immigration and Nationality Act. The Federal Insurance Contributions Act also does not apply to compensation paid enlisted personnel for voluntarily performing work outside of their regular duty hours in accordance with par. 3123.

b. Procedures The procedures applicable to Social Security Taxes are described in Chapter 5.

SECTION III STATE AND LOCAL TAXES

2631 GENERAL

The tax sources of revenue of the states, territories, the District of Columbia, and localities with which the Exchange may come in contact, can be divided, broadly, into the following categories: license taxes, property taxes, sale and use taxes, other excise taxes (beer, liquor, and tobacco product taxes), and income taxes. The applicability of the foregoing taxes to Exchanges and Exchange activities are considered in par. 2632–2636.

2632 LICENSE TAXES

1. GENERAL

State and local tax authorities may not require an Exchange to obtain a license, and to pay the tax applicable thereto, in order to carry on any of its authorized activities, unless specifically authorized by Federal statute.

2. STATE MOTOR VEHICLE REGISTRATION FEES

A state or locality may not require Exchanges to pay registration or license fees for Exchange motor vehicles.

2633 PROPERTY TAX

State, local, territory, and District of Columbia taxes which are imposed upon the owner or possessor of property may not be levied upon Exchanges.

2634 SALES AND USE TAXES

The courts have made a distinction between the "legal incidence" of a tax and its "economic burden." Thus, the courts have come to hold that a state may not impose a tax, the "legal incidence" of which falls directly upon the Federal Government or any of its instrumentalities. That means that a state may neither require an Exchange to pay a tax which is imposed directly upon it, nor require it to collect a tax imposed upon its authorized patrons. A state may, however, validly impose a tax which affects the Exchange only indirectly by increasing the cost of the supplies that it purchases. In such a case, the economic burden would eventually fall upon the Exchange, but the legal incidence would be elsewhere. Therefore, when a state imposes a tax directly upon a supplier to the Exchange and it is his obligation to collect and pay it, the tax is valid, even though the Exchange would eventually bear the burden of the tax, economically, by paying higher prices. An exception to the general rule mentioned herein was made in the case of gasoline taxes when Congress declared that the states had the right to tax directly a sale by the Exchange when gasoline is for personal use of the Exchange patron. Such tax may not be imposed directly when gasoline is sold:

1. for use in government vehicles, including Exchange vehicles;

2. for use in motor vehicles owned by and registered in the name of the American National Red Cross, when the vehicle is operated by official personnel of that organization and the vehicle is to be used solely in connection with the work of that organization for the military services of the United States.

Many states provide an exemption from their sales and use taxes to manufacturers, wholesalers, and distributors, when it involves a sale for resale. A further exemption is also provided by most states when a sale is made to the Federal Government or its instrumentalities, including military exchanges. Since state laws differ, it is incumbent upon each Exchange to find out whether an exemption is provided for its purchases, and to take advantage of any exemptions given.

2635 OTHER EXCISE TAXES (BEER, LIQUOR, AND TOBACCO PRODUCTS)

Beer, liquor, and tobacco products taxes involve considerations similar to those discussed under par. 2634, and the same general rules apply. Because these products comprise a substantial part of an Exchange's business, great care will be taken to determine whether an exemption is provided under state and local law. It should be noted that most states do provide an exemption when a sale to a military exchange is concerned.

2636 STATE AND LOCAL INCOME TAXES

1. EXCHANGES EXEMPT

Exchanges are exempt from all state and local income taxes.

2. TAX WITHHOLDING

The provisions of the Navy Comptroller Manual, relating to the withholding of income tax imposed by a state, territory, possession or local taxing authority from compensation of civilian employees, are applicable to Exchange civilian employees. Such income tax, however, will not be withheld from the compensation paid to enlisted personnel for voluntarily performing work outside of their regular working hours.

BEST COPY AVAILABLE

Members of tax Commission:
Arny Rhoden, *Chairman*
Robert A. Biggs, Jr., *Commissioner*
Robert L. Vaughan, Sr., *Commissioner*

Uree Garner, *Director*
A. B. C. Division
Telephones:
Central Office 354-6282
Warehouse 354-6235

ALCOHOLIC BEVERAGE CONTROL DIVISION,
STATE TAX COMMISSION,
Jackson, Mississippi 39205, August 8, 1973.

COMMANDING OFFICER,
Keesler Air Force Base, Building 1404,
Biloxi, Mississippi.

DEAR SIR: Attached is a copy of a memorandum regarding the Mississippi Alcoholic Beverage Control Division Regulation No. 25. This memorandum has been sent to the vendors from whom merchandise is purchased for the State of Mississippi.

I am going to request that you inform your purchasing personnel of the contents of my memorandum to the vendors and will ask that they follow the instructions contained therein.

Thank you very much for your cooperation in this matter.

Very truly yours,

Uree Garner
UREE GARNER,
Director, Alcoholic Beverage Control Division.

UG/sdh Enclosures.

Members of tax Commission:
Arny Rhoden, *Chairman*
Robert A. Biggs, Jr., *Commissioner*
Robert L. Vaughan, Sr., *Commissioner*

Uree Garner, *Director*
A. B. C. Division
Telephones:
Central Office 354-6282
Warehouse 354-6235

ALCOHOLIC BEVERAGE CONTROL DIVISION,
STATE TAX COMMISSION,
Jackson, Mississippi 39205, August 8, 1973.

To: All Vendors
Attention: Control State Managers
From: Uree Garner
Subject: Regulation No. 25 "Sales to Military Post Exchanges, Etc.

Attached is a copy of Regulation No. 25. Your attention is called to the option given to post exchanges, ship stores, and officers' clubs operated by military personnel (including those operated by the National Guard). The choice is granted to the purchasing direct from the *distiller* or from the Alcoholic Bev-

erage Control Division of the State Tax Commission. Purchases are not to be placed with any other source.

Uree Garner

UREE GARNER,

Director, Alcoholic Beverage Control Division.

UG/sdh.

Supreme Court of the United States

No. 74-548

UNITED STATES, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

APPEAL from the United States District Court for the Southern District of Mississippi.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

JANUARY 13, 1975.

Mr. Justice Douglas took no part in the consideration or decision of this matter.

U.S. GOVERNMENT PRINTING OFFICE 1975—O-567-894

Supreme Court, U. S.
FILED
DEC 6 1974
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION TO DISMISS OR AFFIRM

A. F. SUMMER
Attorney General
State of Mississippi

GUY N. ROGERS
Assistant Attorney General
State of Mississippi

ROBERT L. WRIGHT
Washington, D. C.
Special Counsel to the
State Tax Commission

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
I. The Questions Argued in the Jurisdictional Statement Are Not Presented by the Decision Below ..	1
II. The Court Below Correctly Decided the Questions Presented To It	3
A. There was no conflict between Mississippi policy and federal policy	3
B. The tax was not imposed on the military retailers	5
C. The tax was explicitly authorized by the Buck Act	7
Conclusion	10
Appendix—Senate Report on Buck Act	12

CITATIONS

CASES:

Alabama v. *King & Boozer*, 314 U.S. 1 (1941)	5
First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 399 (1968)	5
Heublein, Inc. v. *South Carolina Tax Commission*, 409 U.S. 275 (1972)	4
Howard v. *Commissioners*, 344 U.S. 624 (1952)	8
McCulloch v. *Maryland*, 4 Wheat. 316 (10a-25a)	5
National Distillers v. *State Board*, 83 Calif. App. 2d 35, 187 Pac. 2d (1947)	10
Polar Ice Cream Co. v. *Andrews*, 375 U.S. 361 (1964) ..	8-9
Sullivan v. *United States*, 395 U.S. 169 (1969)	9
Vance v. *Vandercook*, 170 U.S. 438 (1898)	3

Page

STATUTES:

Buck Act, 61 Stat. 643 et seq., 4 U.S.C. 105-111 ..... 7, 8
California Revenue Taxation Code, Sec. 32201 10
Code of Laws of South Carolina, 1962, Chap. 16, Sections 1285-86 and 1286.1 (1973 Cumulative Supplement) 4

SENATE REPORT:

No. 4625, May 16, 1940, submitted by the Committee on Finance, 76th Congress, 3rd Session, entitled Application of State Sales, Use and Income Taxes to Transactions in Federal Areas 12-20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

---

MOTION TO DISMISS OR AFFIRM

The appellees hereby move the Court to dismiss this appeal or affirm the judgment below upon the following grounds:

1. The questions argued in the Jurisdictional Statement are not presented by the decision below.

2. The Court below correctly decided the questions presented to it.

I. THE QUESTIONS ARGUED IN THE JURISDICTIONAL STATEMENT ARE NOT PRESENTED BY THE DECISION BELOW.

The Statement misstates the questions presented. The tax in question was levied upon distillers for the privilege of selling liquor in Mississippi at wholesale.

The wholesaler's mark-up established by this regulation was construed by the Court below as a privilege tax imposed upon distillers when they opted to sell the military outlets directly instead of through the state (4a,[1] footnote 4). Since the Mississippi statute reserves wholesale liquor revenues exclusively for the state (2a), the regulation could only permit the distillers to sell direct to the military retailers upon condition that they remit the specified wholesaler's mark-up to the state. One sanction against refusing to so protect the state's revenue is exclusion from the privilege of doing business in Mississippi.

The first two stated questions (2-3) thus rest on two erroneous premises, i.e., that the Court below found the taxed distillers to be "out-of-state" in a business or legal sense and that it held the mark-up was a state tax "on instrumentalities of the United States." The military retailers were found to be such instrumentalities but the Court also found that they were not taxed.

The third question stated (3) rests on an equally erroneous premise that the Court below had found a conflict between Mississippi's liquor control policy and federal procurement policy. The opinion notes that Mississippi's exercise of its exclusive right to control the wholesaling of liquor within its borders, merely requires the application of a uniform and reasonable percentage mark-up upon prices individually and competitively set by the distillers (33a-34a). The Statement now complains that the regulation violates fed-

[1] The numbers cited herein followed by the letter a are page references to the Appendix to the Jurisdictional Statement. The other page references are to the Jurisdictional Statement itself.

eral procurement policy by preventing competition between Mississippi and out-of-state wholesalers for the business of military retailers in Mississippi (16-17), a wholly new contention.

The Tax Commission of course insisted that any exception to retailer purchases from the state must be confined to distillers, against whom the state could enforce collection of its wholesaler's mark-up by license revocation (54a-55a, 64a). Competition between out-of-state wholesalers and the state of Mississippi for the business of any Mississippi retailer was automatically precluded by its statute, which gives the state a wholesaling monopoly. This contention that Mississippi must permit competition between itself and other wholesalers is a belated claim that a state cannot lawfully pre-empt the wholesaling of liquor to retailers within its borders for itself. That contention was not litigated below, is therefore not before this court, and in any event, has no merit. *Vance* v. *Vandercook,* 170 U.S. 438 (1898).

II. THE COURT BELOW CORRECTLY DECIDED THE QUESTIONS PRESENTED TO IT.

A. There was no conflict between Mississippi policy and federal policy.

Every state in the Union relies upon revenue from liquor sales to support governmental functions. The eighteen so-called monopoly or control states permit no private wholesaling of liquor and reserve revenues from that business exclusively for themselves. Others, so-called license states, license and tax the business of wholesaling liquor to retail outlets within their respective borders. To protect their tax revenues, the "license states" customarily require that wholesaling be confined to the wholesalers they license to do busi-

ness there. Thus, the licensed local wholesalers have a monopoly of sales to retailers within the state. Competition between the licensed wholesalers and out-of-state wholesalers, is legally impossible.

One of the tax consequences of a "license state's" system of controlling wholesale liquor sales was brought to this Court's attention in *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972). South Carolina taxes both wholesale sales of liquor [2] and the net income derived by distillers upon their sales to the state's wholesalers. Heublein contended that this state income tax violated a federal statute designed to limit state taxation of a national business's net income because South Carolina compelled Heublein to engage in taxable business activity within the state that served no business purpose of Heublein. Instead of permitting distillers like Heublein to sell their wholesalers directly, South Carolina requires that the initial sale be made to a local agent, who then ships to the wholesalers from a state licensed warehouse. Ibid at 278. This requirement was sustained as "reasonably related" to the state's liquor control purposes. Ibid at 283.

The view of the Supremacy Clause advanced in the latest Jurisdictional Statement filed in Mississippi's case seems to conflict with this Court's most recent reconciliation of state liquor control with federal tax policy. According to the Statement (p. 16-17), because federal procurement policy allegedly favors unrestricted competition, any state's regulation of the liquor business that does not authorize unlicensed

[2] See Code of Laws of South Carolina, 1962, Chapter 16, sections 65-1281, 1285-86, and 1286.1 (1973 Cumulative Supplement).

competition in wholesale sales to federal retailers located within their respective borders violates the Supremacy Clause. However, there is nothing in the record made below or in any federal statute or regulation to suggest that the United States has any policy of avoiding state regulation or taxation of liquor procurement. On the contrary, the military regulation in question was amended, prior to the adoption by Mississippi of its own regulation, to delete a prior invitation to disregard state law in procuring liquor.[3]

The Jurisdictional Statement's assumption that, absent the regulation, the military retailers could "obtain their liquor" at lower prices than they paid (16) is supported only by the author's imagination. The Stipulation of Facts (51a-61a) does not show what prices were actually paid during the period of regulation or before. Nor does the Stipulation suggest that the military elected to buy direct from distillers to get a better price. Paragraph 12 simply notes this election without any explanation of its purpose (53a).

B. The tax was not imposed on the military retailers.

The Statement also makes an unwarranted claim that the Court below disregarded this Court's decision in *First Agricultural National Bank* v. *State Tax Commission,* 392 U. S. 339 (1968). The opinion below carefully considered that case and the entire line of federal immunity from state tax cases springing from *McCulloch* v. *Maryland,* 4 Wheat. 316, (10a-25a). The opinion correctly concluded that nothing said in this national bank case had impaired the validity of *Alabama* v. *King & Boozer,* 314 U.S. 1 (1941), which had laid to rest the notion that the

[3] See the change of June 9, 1966 (paragraph 8, 50a).

economic incidence of a state tax could determine its validity (16a-17a, 25a).

In the bank case this Court concluded first that national banks had a congressionally established immunity from all forms of state taxation except as to real property and bank shares. 392 U.S. 339, 346. The Court then declined to apply to the bank's purchases a Massachusetts sales tax that its legislature intended should be paid by purchasers. Ibid at 348.

This state tax immunity of National banks rests upon a legislative adoption and perpetuation of a decision that resulted from Maryland's use of a tax to pre-empt for itself the creation of currency, a natural and inevitable federal function. The federal immunity sought here is from taxation which has its roots in a police power to control the liquor traffic, traditionally exercised by the states. Since it took a constitutional amendment (the eighteenth) to supersede such state control it is highly doubtful that any mere legislative or administrative declaration of federal procurement policy could nullify a state's power to tax its wholesalers upon sales made to federal retailers within the state.

In any event, as the court below pointed out, Mississippi's intention was to tax the sellers rather than the purchasers and the bank case is therefore inapposite (24a). Its opinion was not rested on any belief "that no sanction would be imposed on any distiller for absorbing the mark-up," as the Statement mistakenly asserts (12). In its discussion of the intent of the Mississippi legislature the opinion merely noted that, unlike Mississippi's sales tax, its mark-up law did not mandate collection from the buyer. See 22a, footnote 10. The opinion had previously observed that the

distillers had been directed by the Tax Commission "to invoice and collect" the mark-up from the military retailers "on pain of criminal penalties and delistment" (20a).

In determining the legal incidence of the tax the court noted that it is the distiller-wholesaler who must "pay the tax *in advance* of its collection from his customer" (20a). Ultimate collection from the military retailers was thus assumed by the decision below, although legal liability for the tax was confined to their suppliers.

C. The tax was explicitly authorized by the Buck Act.

A curious aspect of the Jurisdictional Statement is its failure to notice the District Court's reliance upon the legislative history of the Buck Act (10a-11a, footnote 12) or this Court's decisions construing that Act (24a, footnote 20, 25a). One purpose of the remand was to determine whether the mark-up as applied to wholesale sales by distillers to military retailers was a tax within the meaning of that Act and if so whether its exempting provisions precluded collection of the tax. *United States* v. *Mississippi Tax Commission,* 412 U.S. 363, 379. The history and purpose of the Buck Act is spelled out in Senator George's Report for the Committee on Finance, not considered in this Court's prior opinion or referred to in the Jurisdictional Statement. We have therefore reproduced that Report in full as an Appendix to this motion.[4]

---

[4] The Report conclusively disposes of one claim on which the prior appeal was rested. It explicitly states as to sales made and delivered to a Federal area, that no exemption may be claimed because of "exclusive federal jurisdiction over the area." Discussion of Section 1a, p. 14, *infra*.

Of the three decisions of this Court dealing with the Act cited in the opinion below, only one, *Polar Ice Cream,* was cited to this Court upon the prior appeal. We have summarized all three in their order of decision.

In *Howard* v. *Commissioners,* 344 U.S. 624 (1952), the Court held that the Buck Act authorized collection of a Louisville, Kentucky, occupational tax measured by gross receipts from activities carried on for the exclusive benefit of the federal government on an enclave over which the United States had exclusive jurisdiction. Justices Black and Douglas dissented on the ground that the Buck Act did not grant federal consent to state taxation for the privilege of doing business with the United States. The majority answered that "The grant was given within the definition of the Buck Act and this was for any tax measured by net income, gross income, or gross receipts." 344 U.S. 624, 629.

Polar Ice Cream Co. v. *Andrews,* 375 U.S. 361 (1964), sustained a Florida wholesaler's tax included in the price of milk bought by post exchanges and measured by the volume sold to them. The court construed that tax, as Mississippi's mark-up was construed below, as a tax levied on wholesalers for the privilege of doing business in the state. Although the economic burden of the tax was borne by the military purchasers its collection from them by the wholesalers did not invalidate the tax. As to the Buck Act the Court said:

> "Besides, 4 U.S.C. § 105, enacted subsequent to James and Standard Oil, supra, confers upon the States jurisdiction to levy and collect a sales or use tax 'in any federal area,' and a sales or use tax is defined as 'any tax levied on, with respect to, or measured by sales . . . of tangible personal property . . . .' 4 USC § 110. We think this provision provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida." 375 U.S. 361, 383.

In *Sullivan* v. *United States,* 395 U.S. 169 (1969), the Court held that Section 514 of the Soldiers and Sailors Civil Relief Act (50 USC App. 24), exempting servicemen from state taxation in respect of personal property, did not relieve them from sales or use taxes in states where they purchased personal property from private sellers. The Court based its ruling on the fact that the relief Act, passed in 1942, says nothing about sales or use taxes, which had been explicitly dealt with in the 1940 Buck Act. The Court construed the Buck Act's federal instrumentality exemption as follows:

> "In the 1940 Buck Act, Congress provided that the States have 'full jurisdiction and power to levy and collect' sales and use taxes in 'any Federal area,' except with respect to the sale or use of property *sold by* the United States or its instrumentalities through commissaries, ship's stores, and the like."[32] 395 U.S. 169, 178. (Emphasis added).

Footnote 32 quotes in full the exempting provisions, 107(a) and (b), and this Court apparently regarded this exemption of federal instrumentalities as inapplicable to sales of merchandise *to* federal retailers. This is indeed the way the current Navy Exchange Manual regards it (22a-23a, footnote 19). The Jurisdictional Statement treats sales of liquor to military clubs for resale as if those sales had an immunity from

state taxation not accorded to sales made to post exchanges for resale of "food, clothing, toilet articles, and other personal items" (395 U.S. 169, footnote 33). A more myopic view of a state's power to tax its suppliers of liquor is difficult to imagine.

CONCLUSION

Finally, the Statement's suggestion that other states "might follow Mississippi's lead in attempting to regulate and tax the purchase of liquor by federal instrumentalities for sale in federal enclaves or on military bases" wrongly implies that Mississippi was the first state to tax wholesale sales to military retailers. Exhibit 9 of the Stipulation of Facts (51a) shows that larger wholesale mark-ups than Mississippi's had been previously collected by Washington, Oregon, and Michigan.[5] California, for a license state example, collects its wholesalers' excise tax on liquor sales by "out-of-state" distillers to federal agencies in California (*National Distillers* v. *State Board*, 83 Calif. App. 2d 35, 187 Pac. 2d 821 (1947)), whether the purchasers are located on Federal enclaves or not. See California Revenue and Taxation Code, Sec. 32201 and 34a, footnote 24. The Statement thus attempts to give the case an aura of importance that its facts deny. Moreover, as we have shown, the Statement attacks the merits of the decision below by assuming that the opinion held what it does not hold.

Military retailers of liquor in Mississippi already possess, by virtue of the regulation under attack, two distinct advantages over all other liquor retailers in

[5] The exhibits referred to in Paragraph 9 of the Stipulation (51d) were all omitted from the Appendix to the Jurisdictional Statement, although this paragraph is meaningless without the exhibits.

the State. The military retailers do not have to collect or pay the 5% sales tax imposed on Mississippi consumers nor do they pay the substantial gallonage taxes imposed on private retailers for the privilege of selling liquor (34a). The sole economic purpose of this appeal is to obtain for military retailers of liquor an additional advantage that no other retailers enjoy, whether military or civilian, i.e., a wholesale price that does not include either a reasonable mark-up needed to cover wholesaling services or a state tax imposed on a wholesaler for the privilege of selling to retailers in the state.

We respectfully submit that this appeal should be dismissed or that the judgment below should be summarily affirmed.

Respectfully submitted,

A. F. Summer
Attorney General

Guy N. Rogers
Assistant Attorney General
State of Mississippi

Robert L. Wright
Washington, D. C.
Special Counsel to the
State Tax Commission

APPENDIX

76TH CONGRESS, 3D SESSION

SENATE

REPORT NO. 1625

APPLICATION OF STATE SALES, USE, AND INCOME TAXES TO TRANSACTIONS IN FEDERAL AREAS

MAY 16 (legislative day, APRIL 24), 1940.—
Ordered to be printed

MR. GEORGE, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 6687]

The Committee on Finance, to whom was referred the Bill (H.R. 6687) to authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property or upon sellers, purchasers, or users of such property measured by sales, purchases, or use thereof occurring in United States national parks, military and other reservations or sites over which the United States Government may have jurisdiction, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

GENERAL STATEMENT

This bill passed the House at the first session of the Seventy-sixth Congress and was referred to the Committee on Finance which reported it to the Senate with certain clarifying changes on July 28, 1939. Due to certain objections being raised to the bill by various departments in the executive branch of the Government after the bill had been reported to the Senate, it was recommitted to the Committee on Finance for further study and recommendation. Your committee, through a subcommittee composed of Senators George, Brown, and La Follette, held a hearing on April 23, 1940, at which time representatives of the various State taxing authorities appeared in favor of the bill and representatives of the War and Navy Departments and of the Department of the Interior appeared in opposition to certain features of the bill.

Upon completion of the hearings, the subcommittee suggested that a conference be held by the representatives of the State agencies and the Federal agencies with a view to recommending to said subcommittee any proposal or proposals upon which said representatives could agree. Such a conference was held and the proposals which were submitted were used as a point of departure by the subcommittee in drafting the amendment reported by your committee.

In general, the bill, as amended, proposes to do three things. First, it provides that State sales and use taxes (with certain exceptions which are hereafter explained) shall be applicable with respect to transactions occurring within Federal areas in the same manner and to the same extent as they are applicable with respect to transactions occurring outside such areas and within the State. Second, it provides that State income taxes shall be applicable with respect to persons residing within a Federal area or receiving income from transactions occurring or services performed in such area in the same manner and to the same extent as they are applicable with respect to persons residing outside such area or receiving income from transactions occurring or services performed outside such area. Third, it contains certain clarifying amendments to section 10 of the Federal Highway Act of June 16, 1936 (known as the Hayden-Cartwright Act permitting State

taxation of sales of gasoline and other motor-vehicle fuels sold in Federal areas for private purposes), and provides that the tax levied and collected under that section shall continue to be levied and collected under that section, as amended, rather than under the authority contained in section 1 of this bill.

Detailed Explanation of the Bill

Section 1(a) of the committee amendment removes the exemption from sales or use taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. At the present time exemption from such taxes is claimed on the ground that the Federal Government has exclusive jurisdiction over such areas. Such an exemption may be claimed in the following types of cases: First, where the seller's place of business is within the Federal area and a transaction occurs there, and, second, where the seller's place of business is outside the Federal area but delivery is made in Federal area and payment received there. This section will remove the right to claim an exemption because of the exclusive Federal jurisdiction over the area in both of these situations. The section will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred.

This section also contains a provision granting the State or taxing authority full jurisdiction and power to levy and collect any such sale or use tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. This additional authorization was deemed to be necessary so as to make it clear that the State or taxing authority had power to levy or collect any such tax in any Federal area within the State by the ordinary methods employed outside such

areas, such as by judgment and execution thereof against any property of the judgment-debtor.

Subsection (b) of section 1 provides that the taxes to be levied and collected under this section shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after June 30, 1940.[6]

Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction; but his less fortunate colleague, who is also ordered there for duty and rents a house outside the academy grounds because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption, is that under the doctrine laid down in *James V. Dravo Contracting Co.* (302 U.S. 134, 1937), a State may tax the income or receipts from transactions occurring or serv-

---

[6] The Bill was not passed until October 9, 1940 and the effective date was changed accordingly to December 31, 1940, 54 Stat. 1060.

ices performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction.

This section contains, for the same reasons, a similar provision to the one contained in section 1 granting the State or taxing authority full jurisdiction and power to levy and collect any such income tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Subsection (b) of section 2 provides that the taxes to be levied and collected under this section shall be applicable only with respect to income or receipts received after June 30, 1940. Your committee, upon recommendation of the representatives of the State taxing authorities, has made the effective dates of both section 1 and section 2 the same for ease in administration and to prevent the income tax section from becoming effective retroactively. The definition of income tax is broad enough to include a sales tax which is measured by gross receipts from sales. To fix an earlier effective date for the income tax section than for the sales tax section would thus result in having different effective dates for the same tax, in some cases, and would also permit the retroactive application of such sales taxes.

Section 3 of the committee amendment provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. This section also provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. An authorized purchaser being a person who is permitted, under regulations of the Secretary

of War or Navy, to make purchases from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, such as post exchanges, but such person is deemed to be an authorized purchaser only with respect to such purchases and is not deemed to be an authorized purchaser within the meaning of this section when he makes purchases from organizations other than those heretofore mentioned.

For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment.

Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal areas over which the United States exercised exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas. The provisions of this section are applicable to all Federal areas over which the United States exercises jurisdiction, including such areas as may be acquired after the date of enactment of this act.

Section 5 of the committee amendment provides that section 1 and 2 shall not be deemed to authorize the levy

or collection of any tax on or from any Indian not otherwise taxed.

Section 6 contains the definitions of the terms used in the committee amendment.

Subsection (a) defines the term "person" as it is defined in section 3797 of the Internal Revenue Code to mean and include an individual, trust, estate, partnership, company, or corporation.

Subsection (b) defines the term "sales or use tax" but excepts from such definition a tax with respect to which the provisions of section 10 of the Federal Highway Act of June 16, 1936, are applicable. Section 10 of that act, commonly known as the Hayden-Cartwright Act, permits State taxation of sales of gasoline and other motor-vehicle fuels sold in Federal areas for private purposes. Your committee thought it desirable that the provisions of that act should be continued in effect without regard to the provisions of section 1 of the committee amendment and therefore any State tax which is imposed on sales of gasoline and other motor-vehicle fuels will continue to be imposed on such sales in Federal areas under the provisions of section 10 of that act, as amended by section 7 of the committee amendment, rather than under the provisions of section 1 of the committee amendment.

Subsection (c) defines the term "income tax" to mean any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. This definition, as well as the preceding definition of sales or use tax must of necessity cover a broad field because of the great variations to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or by any other name) if it is levied on, with respect to, or measured by, net income, gross income, or gross receipts.

Subsection (d) defines the term "State" to include any Territory or possession of the United States. The District of Columbia was not included in the definition since Congress is the local legislature for the District and any Sales, use or income taxes enacted for the District are applicable in all areas within said District.

Subsection (e) defines the term "Federal area" to mean any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States. Any Federal area, or any part thereof, which is located within the exterior boundaries of any State is deemed to be a Federal area within such State for the purposes of this act. For example, Yellowstone National Park is a Federal area which is located within the exterior boundaries of three States (Wyoming, Montana, and Idaho) and therefore, for the purposes of this act, that part of the Park which falls within the exterior boundaries of Wyoming will be included within Wyoming's taxing jurisdiction, that part which falls within Montana will be included within Montana's taxing jurisdiction, and that part which falls within Idaho will be included within Idaho's taxing jurisdiction.

Section 7 (a) of the committee amendment amends section 10 of the Hayden-Cartwright Act so that the authority granted to the States by such section 10 will more nearly conform to the authority granted to them under section 1 of this act. At the present time a State such as Illinois, which has a so-called gallonage tax on gasoline based upon the privilege of using the highways in that State, is prevented from levying such tax under the Hayden-Cartwright Act because it is not a tax upon the "sale" of gasoline. The amendments recommended by your committee will correct this obvious inequity and will permit the levying of any such tax which is levied "upon with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels."

Subsection (b) of section 7 is a clarifying amendment to such section 10 restating what was the obvious intent of the original act.

Your committee has also amended the title of the bill to conform to the changes made in the text.

Supreme Court, U. S.
FILED
MAR 17 1975
MICHAEL RODAK, JR., CLERK

No. 74-548

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
MARK L. EVANS,
Assistant to the Solicitor General,
JONATHAN S. COHEN,
RICHARD FARBER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions, statutes and regulation involved	3
Statement	3
Summary of argument	9
Argument:	
I. The Mississippi regulation imposes an unconstitutional tax upon instrumentalities of the United States	14
A. The markup is a tax on federal instrumentalities that is barred by the constitutional principle of federal immunity from state taxation	14
1. Instrumentalities of the United States are immune from state taxation	14
2. The Mississippi markup is a tax on federal instrumentalities	15
B. The State's power under the Twenty-first Amendment to regulate transactions in alcoholic beverages does not negate the federal government's immunity from state taxation	24
C. The markup is also unconstitutional because it discriminates against the United States and those with whom it deals	29

II. The United States has not consented to the imposition of the State's markup tax on the sale and delivery of alcoholic beverages by out-of-state suppliers to the purchasing military facilities located on the two exclusively federal enclaves, and Mississippi is therefore without power to tax those transactions ..... Page 31
III. The Mississippi regulation is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policy 33
Conclusion 43
Appendix 45

CITATIONS

Cases:

Alabama v. *King & Boozer*, 314 U.S. 1 ..... 16, 22
American Oil Co. v. *Neill*, 380 U.S. 451 23
California v. *LaRue*, 409 U.S. 109 ..... 24, 28
Collins v. *Yosemite Park Co.*, 304 U.S. 578 26
Colorado National Bank v. *Bedford*, 310 U.S. 41 21
First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 339 ..... 10, 16, 17, 18, 20
Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 ..... 25, 26
James v. *Dravo Contracting Co.*, 302 U.S. 134 16
Johnson v. *Maryland*, 254 U.S. 51 41
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 ..... 15, 21
Lau v. *Nichols*, 414 U.S. 563 30
Leslie Miller, Inc. v. *Arkansas*, 352 U.S.1 87 41
Mayo v. *United States*, 319 U.S. 44 ..... 14, 41, 42
McCulloch v. *Maryland*, 4 Wheat. 316 ..... 11, 14, 25
Moses Lake Homes, Inc. v. *Grant Co.*, 365 U.S. 744 29
National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 17

Cases—Continued

Norton Co. v. *Department of Revenue*, 340 U.S. 534 ..... Page 23
Paul v. *United States*, 371 U.S. 245 ..... 13, 14, 36, 38
Penn Dairies, Inc. v. *Milk Control Commission*, 318 U.S. 261 39
Phillips Chemical Co. v. *Dumas Independent School District*, 361 U.S. 376 ..... 12, 29, 31
Polar Ice Cream & Creamery Co. v. *Andrews*, 375 U.S. 361 23
Public Utilities Commission v. *United States*, 355 U.S. 534 ..... 38, 39
Spector Motor Service v. *O'Connor*, 340 U.S. 602 25
United States v. *City of Detroit*, 355 U.S. 466 ..... 11, 29
United States v. *County of Allegheny*, 322 U.S. 174 ..... 11, 15
United States v. *State Tax Commission of Mississippi*, 412 U.S. 363 ..... 3, 4–5, 6, 31
Yu Cong Eng v. *Trinidad*, 271 U.S. 500 30

Constitution, statutes and regulations:

Buck Act, 61 Stat. 644–645, 4 U.S.C. 105–111 6
United States Constitution:
Article I, Section 8 ..... 38, 45
Article I, Section 10, Clause 2 27
Article IV, Section 3 ..... 34, 45
Article VI 45
Eighteenth Amendment 2, 6
Twenty-first Amendment 9, 11, 14, 15, 24, 25, 26, 28, 42
4 U.S.C. 105(a) 7, 12, 32, 33, 46
4 U.S.C. 107(a) 7, 12, 32, 46
4 U.S.C. 110(b) 32, 47
10 U.S.C. 2303(a) 37
10 U.S.C. 2305(c) 37
28 U.S.C. 2281 5
50 U.S.C. App. 473 34

Constitution, statutes and regulations—Continued

	Page
Mississippi Code, 1972:	
§ 27–71–11	4, 48
§ 67–1–41, et seq	3
§ 67–1–41	3, 47
Mississippi State Tax Commission Regulation 25	3, 4, 18, 19, 20, 29, 33, 35, 36, 40, 48
32 C.F.R. Pt. 261	34
32 C.F.R. 261.4(c)(1)	13, 34–35
32 C.F.R. 261.4(c)(2)	35
32 C.F.R. 261.4(c)(1) (1966 rev.)	35
32 C.F.R. 538.1(c)(1)	28
Air Force Regulations:	
AFM 34–3, Vol. IV	27, 28
¶ 1–1	27
¶ 4–3	28
AFR 34–3, Vol. II	28
¶ 3–1b	28
Navy Regulations:	
NAVPERS 15951	28
¶ 101	28
¶ 104(b)	28
¶ 1005	28
¶ 1009	28
Miscellaneous:	
76 Cong. Rec.:	
4141	26
4145	26
4148	27
4170	26
4219	26
4508	26
4510	26
4513	27
4520	27
S. Rep. No. 1625, 76th Cong., 3d Sess	34

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a–36a) is reported at 378 F. Supp. 558.

JURISDICTION

The judgment of the district court (J.S. App. 37a–38a) was entered on July 12, 1974. A notice of appeal to this Court (J.S. App. 39a–40a) was filed on August 8, 1974. On October 1, 1974, Mr. Justice Powell extended the time for docketing the appeal to and including November 6, 1974. The appeal was docketed on that date, and probable jurisdiction was noted on

January 13, 1975 (A. 64). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers to collect a "wholesale markup" on alcoholic beverages sold to military officers' clubs and other nonappropriated fund activities located on military bases within Mississippi and to remit the "markup" to the Tax Commission. Two of the four military bases in Mississippi are enclaves of exclusively federal jurisdiction; the other two bases are on territory over which the United States and the State of Mississippi exercise concurrent jurisdiction. The questions presented are:

1. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

2. Whether the consent of the United States under the Buck Act to the imposition of state sales taxes on sales occurring within exclusively federal enclaves is inapplicable under the terms of that Act because Mississippi's tax is imposed upon instrumentalities of the United States.

3. Whether the Mississippi regulation is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policies promulgated under the general congressional power to regulate military affairs.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

The relevant provisions of the United States Constitution, the Buck Act, the Mississippi Local Option Alcoholic Beverage Control Law, and Regulation 25 of the Mississippi State Tax Commission are set forth in the appendix to this brief, *infra,* pp. 45–48.

STATEMENT

This case is here for the second time. The Court found it unnecessary to resolve in its prior decision the issues that are presented in the present appeal. See *United States* v. *State Tax Commission of Mississippi,* 412 U.S. 363.

1. The material facts are not in dispute.[1] Prior to 1966, Mississippi prohibited the sale or possession of alcoholic beverages. In that year, it adopted a Local Option Alcoholic Beverage Control Law which provides that the State Tax Commission is the sole importer and wholesaler of alcoholic beverages. Miss. Code 1972, §§ 67–1–1, *et seq.* The Commission is authorized to sell to retailers in the state "including, at the discretion of the commission, any retail distributors operating within any military post * * * within the boundaries of the state, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes" of the Act (§ 67–1–41).

[1] The case was submitted on a stipulation of facts (A. 29–42).

A related statute directs the Commission to add to the cost of alcoholic beverages a "markup" which in its judgment would be adequate to cover the cost of wholesaling, provide a reasonable profit, and render prices competitive with those in neighboring states (§ 27–71–11).

Pursuant to its authority under the statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship's stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. On direct purchases by such military facilities, the regulation requires that distillers collect and remit to the Commission the "usual wholesale markup" charged by the Commission on its own sales to retailers. During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (A. 36).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from out-of-state distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (A. 36–37). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal enclaves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process there (see *United States* v. *State Tax Commission of Mississippi, supra,* 412 U.S.

at 371–373). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (A. 30).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the markup was improper. The military authorities also attempted to pay the amounts for the markup into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the markups on their military sales to the Commission, the distillers would be subject to criminal prosecution and to delisting, *i.e.,* loss of the privilege of selling to the Commission for retailing in Mississippi (A. 37–38). To obtain liquor, therefore, the military facilities were required to pay the markup to the distillers. By July 31, 1971, $648,421.92 had been paid under protest to suppliers outside Mississippi for such markups (A. 39).

2. The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional, an injunction against its continued enforcement, and a judgment for the amount already paid for markups.

The three-judge district court, convened pursuant to 28 U.S.C. 2281, granted summary judgment against the government. It held that the constitutional grants of authority to Congress to establish and regulate military forces and to exercise jurisdiction over lands

570-889—75——2

belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (340 Supp. 903, 904). The court did not address the government's other contentions—that the regulation imposes an unconstitutional tax upon federal instrumentalities and impermissibly interferes with federal procurement regulations and policy.

On direct appeal, this Court vacated the district court's judgment and remanded the case for further proceedings (412 U.S. 363). It held that "the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction" (*id.* at 368, fn. omitted). The Court declined to reach the issues that the district court did not address. "[W]e believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments" (*id* at 381).[2]

[2] The Court also declined to rule on the State's contention that the United States has consented under the Buck Act, 4 U.S.C. 105–111, to the imposition of the "markup" tax on sales to military facilities on the two federal enclaves. "Having found that the District Court erred in the basis on which it did dispose of this case," this Court decided to leave "for determination by that court in the first instance on remand" the issues "[w]hether the markup should be treated as a tax on sales occurring within a federal area within the meaning of [4 U.S.C.] § 105(a), see also 4 U.S.C. § 110(b), and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves" (412 U.S. at 379).

3. On remand, the three-judge district court again entered a judgment dismissing the government's complaint (J.S. App. 37a–38a). It held, with respect to liquor sales by out-of-state distillers to military facilities on the exclusively federal enclaves, that the State's markup requirement is a "sales or use tax" to which the United States has consented under Section 105(a) of the Buck Act, 4 U.S.C. 105(a) (J.S. App. 9a). Although it recognized that the State regulation by its own terms requires the out-of-state distiller "both to collect [the markup] from the military purchaser and pay it over to the State" (*id.* at 18a), the court ruled that the tax is not on an instrumentality of the United States within the meaning of the Buck Act's exception in 4 U.S.C. 107(a). It held that the "legal incidence" of the tax—which it defined as "the legally enforceable, unavoidable liability for nonpayment of the tax" (*ibid.*)—falls upon the distiller because the distiller is free to absorb the economic burden of the markup and "[t]he purchaser-vendee is not legally or otherwise obligated to the Commission or the State for payment of the markup" (*id.* at 21a).

The district court disposed of the government's constitutional tax immunity argument on the same ground: the markup is not an unconstitutional tax on federal instrumentalities, because the legal incidence of the tax falls on the distiller, not on the military purchasing facilities (*id.* at 27a). The court also ruled that "[t]here [is] no discrimination against the federal government within the State's tax scheme" (*id.* at 36a).

Finally, the court held that, "[s]ince the markup applies prorata to all wholesale liquor transactions, it does not alter the [military] vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor procurement under 'the most advantageous contract, price and other factors considered' " (*id.* at 33a–34a). Although the State regulation "may reduce the military's profit margin from retail liquor sales," "[t]he slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment" (*id.* at 35a). Like its ruling on the tax immunity issues, the court's decision on the military procurement policy issue rested on its view that, under the Mississippi regulation, "[o]nly the vendor, in his individual capacity, is subject to state control" (*ibid.*).[3]

[3] This aspect of the district court's opinion apparently was meant to apply only to the bases over which the United States and Mississippi exercise concurrent jurisdiction. The court believed that its resolution of the Buck Act issue with respect to the exclusively federal enclaves made it unnecessary to reach the military procurement issue as it affects those bases (J.S. App. 25a–26a, n. 21). But see pp. 33–34, n. 14, *infra*.

SUMMARY OF ARGUMENT

In its prior opinion in this case, this Court held that the Twenty-first Amendment gives Mississippi no power to regulate, by taxation or otherwise, sales of liquor from out-of-state suppliers to military facilities located on the two enclaves of exclusively federal jurisdiction. With respect to those transactions, there is no "transportation or importation [of liquor] into [the] State * * * for delivery or use therein," within the meaning of Section 2 of the Twenty-first Amendment. The State argued in this Court, however, that the United States had consented under the Buck Act to the imposition of a markup on such sales to facilities on the exclusively federal enclaves. The Court remanded to the district court to permit it to consider that contention in the first instance.

The Court also declined to reach the other issues tendered by the government's appeal, both of which applied equally to all four bases in Mississippi. Those issues were whether the markup is an unconstitutional tax on instrumentalities of the United States and whether it is also invalid because it conflicts with federal procurement regulations and policy. As with the Buck Act question, the Court determined that it would be useful to have the district court's views on the instrumentality and Supremacy Clause issues.

The district court on remand decided all three of those issues adversely to the United States, and all three are presented by the present appeal.

I

A. The district court correctly held that the markup is a sales tax and that the military purchasing facilities are instrumentalities of the United States. It erroneously concluded, however, that the legal incidence of the Mississippi tax falls upon the out-of-state seller rather than the military purchaser and that the constitutional doctrine of federal immunity from state taxation is therefore inapplicable.

The district court's definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (J.S. App. 18a)—was rejected by this Court in *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339. The Court there held that "a [state] sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347), regardless of which party is legally responsible for payment to the State.

Agricultural Bank controls this case. The Mississippi regulation provides that the markup "shall be paid by [the military] organizations directly to the distiller," who "shall in turn remit" it to the State (App., *infra*, p. 48), and the State Tax Commission specifically instructed distillers that the markup "must be invoiced to the Military and collected directly from the Military" (A. 38). Like the Massachusetts sales tax in *Agricultural Bank*, the Mississippi markup "by its terms must be passed on to the purchaser" (392 U.S. at 347); it, too, "imposes the legal incidence of the tax upon the purchaser" (*ibid.*).

B. The federal government's immunity from state taxation is "the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), and "this Court never has departed from that basic doctrine or wavered in its application" (*United States* v. *County of Allegheny*, 322 U.S. 174, 176). The Twenty-first Amendment gives the states broad power to regulate the sale and consumption of alcoholic beverages. But there is nothing in the Amendment's language or history to suggest that it was intended to negate so fundamental an incident of federalism as the United States' immunity from state taxation. The State's authority under the Twenty-first Amendment does not encompass the power to impose a sales tax upon facilities of the United States armed forces.

C. It is well established that a State tax may not, consistent with the Constitution, "discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit*, 355 U.S. 466, 473). The district court found the Mississippi tax nondiscriminatory, but we submit that it impermissibly discriminates against the government and those who deal with it in two ways.

If, as we argue, the incidence of the tax is upon the military purchasers rather than upon the distillers, the State's regulation discriminates against the United States in favor of the State's licensed retailers. They receive, in return for the wholesale markup that they pay, wholesaling, storage, and delivery services; as to them, the markup, at least in part, is compensation rather than taxation. The military facilities, however,

receive no services from the State in return for the markup they must pay on their direct purchases from out-of-state suppliers; as to them, the markup is a tax.

Moreover, even if the incidence of the tax were deemed to fall on the distillers, the tax would be discriminatory against those who deal with the United States. Distillers who sell only to the State pay no tax, while those who sell to the military must pay a 17 or 20 percent tax on each such sale. The State's regulation thus impermissibly fails to "treat those who deal with the Government as well as it treats those with whom [the State] deals itself" (*Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376, 385).

II

The Buck Act does not consent to the State's tax. Although the Act provides that no person shall be relieved from the payment of any State sales tax "on the ground that the sale * * * occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)), it also provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof" (4 U.S.C. 107(a)). The Mississippi markup, as we have shown, is a tax levied on instrumentalities of the United States, and it therefore falls outside the scope of the Buck Act's consent.

III

Mississippi's regulation is also invalid for the independent reason that it impermissibly interferes with

the exclusive federal authority to regulate military procurement. Congress, in the exercise of its express constitutional authority to regulate military affairs, delegated to the Secretary of Defense plenary authority to promulgate regulations governing the traffic in alcoholic beverages on military bases. The Secretary's regulations provide that the procurement of liquor shall be conducted in such a manner as to "obtain for the Government the most advantageous contract, price, and other factors considered" (32 C.F.R. 261.4(c)(1)). That provision closely parallels the language of the general armed forces procurement regulation and reflects the same policy of requiring "active competition so that the United States may receive the most advantageous contract" (*Paul* v. *United States,* 371 U.S. 245, 253).

Mississippi's markup regulation collides with the federal procurement policy by inhibiting price competition for sales of liquor to the military in two respects. First, by requiring out-of-state distillers artificially to inflate their prices by the same 17 or 20 percent that the State itself adds as a wholesale markup, the regulation eliminates serious price competition between distillers on the one hand and the State Tax Commission on the other hand. Second, by purporting to limit the military's freedom to purchase liquor from out-of-state suppliers other than distillers, the regulation restricts the range of potential competitors for the military's business. In both cases, the regulation defeats the federal procurement policy of obtaining the lowest possible competitive price.

570-889—75——3

As this Court's decision in *Paul, supra,* makes clear, a state price regulation that clashes with military procurement policy is invalid under the Supremacy Clause. Moreover, insofar as Mississippi's regulation limits the military's sources of supply, it impermissibly interferes with an important "function of government" which, under the Constitution, must be left "free from regulation by any state" (*Mayo* v. *United States,* 319 U.S. 441, 445, 447).

The Twenty-first Amendment, which in any event applies only with respect to the concurrent jurisdiction bases, does not diminish the exclusive congressional authority to regulate military affairs and does not empower Mississippi to intrude upon the federal procurement function. The federal government's freedom from state regulation "is inherent in sovereignty" (*Mayo, supra,* 319 U.S. at 447) and is not abrogated by the State's assertion of power under the Twenty-first Amendment.

ARGUMENT

I

THE MISSISSIPPI REGULATION IMPOSES AN UNCONSTITUTIONAL TAX UPON INSTRUMENTALITIES OF THE UNITED STATES

A. THE MARKUP IS A TAX ON FEDERAL INSTRUMENTALITIES THAT IS BARRED BY THE CONSTITUTIONAL PRINCIPLE OF FEDERAL IMMUNITY FROM STATE TAXATION

1. Instrumentalities of the United States are immune from state taxation.

"[S]ince 1819, when Chief Justice Marshall in [*McCulloch* v. *Maryland,* 4 Wheat. 316] expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application" (*United States* v. *County of Allegheny,* 322 U.S. 174, 176). The reaches of that constitutional immunity, particularly insofar as it protects persons who act for or deal with the United States, have expanded and contracted over the years. "But unshaken, rarely questioned, * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation" (*id.* at 177). See also *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 117–118, 122.

If, therefore, the Mississippi markup requirement operates as a tax on instrumentalities of the United States, it is constitutionally invalid unless Congress has consented to the tax or unless the State's assertion of power under the Twenty-first Amendment abrogates the federal government's tax immunity.

2. The Mississippi markup is a tax on federal instrumentalities.

The district court found, and the parties agree, that the State's regulation requiring out-of-state distillers to collect a markup on their sales of alcoholic beverages to military purchasing facilities is a tax (J.S. App. 8a) and that the purchasing facilities are instrumentalities of the United States entitled to the same immunity from state taxation to which any other arm of the federal government is entitled (*id.* at 9a). The district court also stated—and with this, too, we take

no issue—that the constitutional principle of federal tax immunity bars only "a state tax whose legal, as opposed to purely economic, incidence falls upon the federal government" (*id.* at 17a). See *Alabama* v. *King & Boozer,* 314 U.S. 1, 8–9; *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 160.

The parties, therefore, are on common ground with the district court to this extent: all agree that "[t]he touchstone for our inquiry [on the tax immunity issue] * * * is the point of legal incidence of Mississippi's wholesale markup on alcoholic beverages" (*ibid.*). If the legal incidence of the tax falls upon the out-of-state distillers, the government is not protected by the doctrine of federal tax immunity. If the legal incidence falls upon the military purchasing facilities, however, the tax violates the immunity principle.

The district court concluded that the legal incidence of the Mississippi markup is upon the distillers rather than the military purchasers (J.S. App. 18a–24a). That conclusion, however, rests upon a definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (*id.* at 18a)—which this Court rejected in *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, a decision that controls the present case.

In *Agricultural Bank,* the Court invalidated a Massachusetts sales tax as applied to purchases of tangible personal property by a national bank.[4] One

[4] The bank's immunity from the tax was conferred by a federal statute, and the Court therefore found it "unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities" (392 U.S. at 341). As we indicated above, there is no dispute here over whether the military purchasing facilities are instrumentalities of the United States entitled to immunity from state taxation.

of the issues was whether the statute imposed the sales tax upon the bank as a purchaser or upon its vendors. The state court had held, as the district court held in the present case, that "[t]he legal incidence of a tax [is] * * * determined by 'who is responsible * * * for payment to the state of the exaction' " (229 N.E. 2d 245, 249) and that under that test the legal incidence of the tax fell upon the vendor, not the purchaser.

This Court rejected the state court's reliance upon legal liability as the test of legal incidence. "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).[5]

Like the Mississippi regulation in this case, the Massachusetts statute required the vendor to add the tax to the sales price, collect it from the purchaser, and remit it to the State. This Court accordingly viewed the statute as establishing "a clear requirement that the sales tax be passed on to the purchaser" (*ibid.*). It is true that the Massachusetts statute, unlike the Mississippi regulation, prohibited vendors

[5] See also *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753. The statute there required out-of-state sellers to collect a use tax from in-state purchasers and to remit it to the State. Although the seller was "made directly liable for the payment of tax whether collected or not," the Court stated that the incidence of the tax was upon "the user of the goods to whom the out-of-state retailers sells" (386 U.S. at 757, n. 9).

from advertising that they would absorb the sales tax. But that was not a decisive consideration in this Court's view of the case.

What the Court considered conclusive was the obvious intention of the state legislature that the tax be collected by the seller and paid by the purchaser. "There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling" (392 U.S. at 348).

The legal incidence of Mississippi's wholesale markup similarly falls upon the purchaser and not the seller. The obvious intention of the Mississippi Tax Commission is to require out-of-state distillers to add the markup to their liquor prices and to pass the markup on to the military purchasing facilities. Regulation 25 provides that direct orders from military facilities "shall bear the usual wholesale markup," that "[t]he price of such alcoholic beverages shall be paid by such organizations directly to the distiller," and that the distiller "shall in turn remit the wholesale markup" to the State (App., *infra*. p. 48). Moreover, the Tax Commission informed alcoholic beverage suppliers by letter that, in order to comply with Regulation 25, "[t]he mark-up regulatory fee * * * must be invoiced to the Military and collected directly from the Military" (A. 38). The regulatory design here is no less clear than the legislative design in *Agricultural Bank*. In both cases, the seller collects the tax and the purchaser pays it.

The district court in the present case thought it significant, however, that "Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the mark-up's economic burden" (J.S. App. 21a). But the Tax Commission itself takes a contradictory view of the matter. In a letter to distillers interpreting Regulation 25, the Commission stated unequivocally that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without * * * collecting [the markup] fee directly from the said Military organization shall be in violation" of the statute and regulation and therefore subject to civil and criminal sanctions (A. 38–39).

Moreover, this Court rejected in *Agricultural Bank* a contention that, "simply because there is no sanction against a vendor who refuses to pass on the tax * * *, this means the tax is on the vendor" (392 U.S. at 348). Where, as here, the tax is intended to be borne by the purchaser, the legal incidence is on the purchaser whether or not the seller is free to absorb the tax without sanction. As this Court stated, "it seems clear to us that the force of the law * * * is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written" (*ibid.*).

Moreover, it is unrealistic to think that the distillers, even if they were free to do so, would voluntarily absorb markups of 17 and 20 percent, which would probably constitute a major portion of their profit on the sales.

The district court also considered it significant that the Mississippi Tax Commission requires distillers who make direct sales to the military to remit the proper markup in advance of its collection from the military.[6] "Since the tax must be prepaid by the seller," the court stated, "it can never become a debt to the supplier separate from the total sales price, nor is it recoverable at law from the purchaser" (J.S. App. 21a).

We do not understand, however, why prepayment of the tax by the seller means that there can be no legal obligation on the part of the purchaser to reimburse the seller, nor do we agree, in any event, that the absence of such obligation is constitutionally significant. What is important is not when the tax is to be remitted to the State by its collecting agent, or whether the agent may sue at law for reimbursement, but whether the law contemplates that the tax be paid by the purchaser. As we have shown, Regulation 25 requires the distillers to collect and the military to pay the established markup on direct liquor sales. It imposes "a sales tax which by its terms must be passed on to the purchaser" (*Agricultural Bank, supra,* 392 U.S. at 347), and it is therefore upon the purchaser that the legal incidence falls.

[6] Regulation 25 itself directs distillers to remit the markups collected from the military "monthly covering shipments made for the previous month" (App., *infra*, p. 48). The Tax Commission informed distillers by letter, however, that the markup on direct sales to the military "must be remitted directly to this Division on the date shipments are made to the Military base" and must subsequently be invoiced to and collected from the military purchasing facility (A. 38).

That conclusion is fortified by this Court's decision in *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110. The Court there held that a state sales tax was unconstitutional as applied to a purchase by the United States, acting through a private contractor designated as the government's purchasing agent, of diesel tractors to be used in constructing a naval ammunition depot. Although the state statute characterized the seller as the taxpayer and required the seller to pay the tax to the Tax Commissioner, it also provided, like the regulation in the present case, that the seller "shall collect the tax levied hereby from the purchaser" (347 U.S. at 111).

It was undisputed that the legal incidence of the sales tax fell upon the purchaser, since the seller was required to collect it from the purchaser. The principal issue in the case was whether the "purchaser" of the tractors was the government or the private contractor. The Court held, on the basis of the federal Procurement Act and the terms of the contract, that the United States was the purchaser and that the tax was therefore invalid.[7]

[7] Our analysis is also buttressed by the decision in *Colorado National Bank* v. *Bedford*, 310 U.S. 41. The Court there upheld a state tax of two percent on the value of certain services rendered by banks, requiring the bank to collect the tax from its customers and remit it to the State. A national bank challenged the application of the tax to its safe-deposit services, arguing that national banks are immune from such state taxation. The Court assumed that "the tax is invalid if laid upon the bank as an instrumentality of government" (310 U.S. at 50). It held, however, that the "tax is upon the user of the safe-deposit boxes, not upon the bank" (*id.* at 51). "The funds which were received by the State came from the assets of the

570-889—75——4

Alabama v. *King & Boozer,* 314 U.S. 1, does not support the district court's conclusion that the Mississippi tax is on the distiller. The Court upheld in that case the constitutionality of a state sales tax as applied to a purchase of building materials by a federal contractor for use in performing a "cost-plus" contract to construct an army camp. As in *Kern-Limerick,* the state statute made the seller the "taxpayer" but required him "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax" (314 U.S. at 7). The state courts had accordingly "construed these provisions as imposing a legal obligation on the purchaser to pay the tax" (*ibid.*), and there was no contention that the legal incidence in fact fell upon the seller. As in *Kern-Limerick,* the principal question was whether the contractor or the United States should be deemed the purchaser. In *King & Boozer,* however, the Court resolved that issue against the government.

The significance of these cases for present purposes is that both involved sales taxes which—like the Mississippi markup—were to be collected by the seller from the purchaser. The decisions turned not on whether the purchaser or the seller bore the legal incidence of the tax, but on whether the government or its contractor was the purchaser; for it was clear that

user, not from those of the federal instrumentality, the bank" (*id.* at 52). Although the Court thus rejected the claim of immunity, the decision supports our submission that the legal incidence of a sales tax falls not upon the seller who is required to collect and remit the tax to the State, but upon the purchaser who is required to pay it.

the legal incidence was upon the purchaser. Both decisions reinforce our position here. A state statute requiring a seller to collect a sales tax from the purchaser and to remit it to the State imposes the legal incidence of the tax upon the purchaser.

In some cases, of course, this Court determined that the legal incidence of a tax was on the seller rather than the purchaser. In none of those cases, however, did the statute require the seller to collect the tax from, or pass it on to, the purchaser. See, *e.g., American Oil Co.* v. *Neill,* 380 U.S. 451, 455–457; *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U.S. 361, 371–372, 381–382; *Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 535, 537.

The district court's conclusion in the present case is, in sum, a radical and unwarranted departure from sound precedent. Its effect is to reject a principle that has been applied without exception in prior decisions and that this Court in *Agricultural Bank* considered "indisputable": "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax on the purchaser" (392 U.S. at 347). We think this Court's decisions make clear that the legal incidence of Mississippi's markup is on the military purchasers, not the distillers. If so, it follows that the markup violates the constitutional principle of federal immunity from state taxation.[8]

[8] It also follows, as we show later in this brief (pp. 31–33, *infra*), that the United States has not consented under the Buck Act to the imposition of the tax on sales to military facilities located on the two bases over which the United States exercises exclusive jurisdiction.

B. THE STATE'S POWER UNDER THE TWENTY-FIRST AMENDMENT TO REGULATE TRANSACTIONS IN ALCOHOLIC BEVERAGES DOES NOT NEGATE THE FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION

If, as we have shown, the markup imposes on instrumentalities of the United States a tax that would be unconstitutional in the absence of the Twenty-first Amendment, it remains for the Court to determine, with respect to the two concurrent jurisdiction bases, whether the subject matter of the Mississippi tax—alcoholic beverages—vitiates the constitutional immunity.[9]

Decisions of this Court establish that the Twenty-first Amendment does not supersede "all other provisions of the United States Constitution in the area of liquor regulations," although "the broad sweep" of the Amendment "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals" (*California* v. *LaRue*, 409 U.S. 109, 114, 115).[10] The primary impact

[9] That issue need not be considered with respect to the exclusively federal enclaves, because, as this Court held in its prior opinion in this case, "the Twenty-first Amendment confers no power on a State to regulate * * * the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction" (412 U.S. at 375). It is only with respect to the concurrent jurisdiction bases that the Twenty-first Amendment can be said to have any application.

[10] Unlike the present case, where the State's regulation is meant only to raise revenue, *California* v. *LaRue* involved an effort by the state liquor commission to eliminate criminal and immoral behavior associated with the consumption of alcoholic beverages in establishments that provided explicitly sexual entertainment. There is here no such focus upon the welfare or morals of Mississippi's residents.

BEST COPY AVAILABLE

of the Amendment is upon the Commerce Clause; yet, although the Amendment was intended to remove "traditional Commerce Clause limitations" restricting state regulation of liquor, this Court has emphasized that the Amendment has neither "repealed" nor "obliterate[d]" even that Clause (*Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329–330, 332).

When a State's power to regulate alcoholic beverages under the Twenty-first Amendment collides with a conflicting interest under the Constitution, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case" (*id.* at 332). We submit that a consideration of the Twenty-first Amendment in light of the fundamental constitutional principle of federal tax immunity, and in light of the interests at stake in this case, indicates that the tax imposed here cannot stand.

Although the Constitution contains no clause providing federal tax immunity, this Court has recognized from the start that the doctrine is deeply rooted in the concept of federalism. The state tax struck down in *McCulloch* v. *Maryland*, 4 Wheat. 316, 425, was "in its nature incompatible with, and repugnant to, the constitutional laws of the Union." Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*id.* at 436). The doctrine has been aptly described as "one of the cornerstones of our constitutional law" (*Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610).

To sustain the Mississippi markup as applied to military clubs would require a holding that the

Twenty-first Amendment abrogated the tax-immunity principle so far as intoxicating liquor is concerned. See *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 345. One would expect that before Congress and the state legislatures were to alter so fundamental an incident of federalism they would have clearly expressed an intention to do so. Yet nothing in the language of the Amendment or in its history suggests even an awareness of that consequence, much less a purpose to accomplish it.

The principal objective of the Amendment was to confer upon the states the power—previously preempted by the federal government in the Eighteenth Amendment—to regulate commerce in alcoholic beverages notwithstanding potential Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 329–331; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 536–538. The sponsor of the resolution that became the Twenty-first Amendment explained that it would restore "to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Senator Blaine). See also 76 Cong. Rec. 4145, 4170, 4219 (remarks of Senators Wagner, Borah, and Walsh).

In the House, it was recognized that the Amendment would not alter the principles of federalism. Repeal of the Eighteenth Amendment "does not seek to change the fundamental law which was subscribed to by Washington, Franklin, Madison, Hamilton and the other immortals of the Constitutional Convention," but rather would be a "return to the federated

Republic which they founded * * *." 76 Cong. Rec. 4513 (remarks of Representative Beck). See also 76 Cong. Rec. 4514, 4520 (remarks of Representatives Dyer and Cole). It was noted also that the Twenty-first Amendment would be of financial advantage to the federal government, which could eliminate the expense of enforcing prohibition while at the same time raising tax revenues on liquor. See 76 Cong. Rec. 4148, 4508, 4510 (remarks of Senator Wagner and Representatives Rainey and Lichtenwalner). No offsetting loss of federal tax immunity was mentioned.

When the Twenty-first Amendment was invoked to support a state law that conflicted with the export-import clause (Article I, Section 10, Clause 2), this Court, concluding that nothing in the language or history of the Amendment suggested a repeal of the clause, held that the Amendment is subordinate. *Department of Revenue* v. *James B. Beam Distilling Co., supra.* On the same analysis, the Amendment must yield here to the fundamental constitutional principle that a state may not tax an instrumentality of the United States.

This is particularly so in the circumstances of this case, for the markups imposed by the Mississippi regulation are not designed to protect the health, welfare, or morals of its citizens, but rather to raise revenue by taxing liquor sales to military facilities. Those facilities are organized and operated pursuant to Air Force and Navy regulations, with an assigned mission of promoting the morale and efficiency of military personnel by providing dining, social, and recreational facilities (AFR 34-3, Vol. IV, ¶ 1-1;

NAVPERS 15951, ¶ 101).[11] They are not operated for the profit of any person or group (AFR 34–3, Vol. IV, ¶ 4–3; NAVPERS 15951, ¶ 104(b)), and no individual has any financial or proprietary interest in the assets of the clubs (AFR 34–3, Vol. II, ¶ 3–1b; NAVPERS 15951, ¶ 104(b)). Although the clubs are required to be self-sustaining, any operating gains are passed along to patrons in the form of reduced prices or improved services or facilities (AFR 34–3, Col. IV, ¶ 4–3; NAVPERS 15951, ¶¶ 1005, 1009). And, though operated with nonappropriated funds, the clubs perform activities necessary to the proper functioning of the armed forces, contributing significantly "to the establishment and maintenance of Service morale and esprit de corps" (A. 41). Cf. 32 C.F.R. 538.1(c)(1).

If the Mississippi regulation, like the one in *California* v. *LaRue, supra,* were designed to protect the health or welfare of its citizens, and if the federal instrumentalities were engaged in a less significant enterprise than promoting the morale and efficiency of the armed forces, the resolution of the constitutional issue might be more difficult. In the circumstances of this case, however, giving the tax immunity doctrine precedence will not interfere with the kind of state regulation that the Twenty-first Amendment was principally designed to permit. Whatever else

[11] The regulations cited in the text are those that are currently in force. The pertinent paragraphs do not materially differ from the regulations that were in force at the time this litigation commenced. The earlier regulations are a part of this record, appearing as Exhibits 19 (AFR 176–1), 20 (AFM 176–3), and 21 (NAVPERS 15951) to the stipulation of facts.

the Amendment does, there is no reason to think that it was intended to negate federal tax immunity and to authorize the imposition of a sales tax upon facilities of the armed forces.

C. THE MARKUP IS ALSO UNCONSTITUTIONAL BECAUSE IT DISCRIMINATES AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit,* 355 U.S. 466, 473). Thus, in *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376, this Court invalidated a local tax on the use of federal property by private lessees because similarly situated lessees of state property were subjected to a significantly less burdensome tax. The Court could find no adequate justification for "so substantial and transparent a discrimination against the Government and its lessees" (361 U.S. at 387), and the tax was therefore held unconstitutional. "[I]t does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself" (*id.* at 385). See also *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744.

In the present case, the district court recognized that a discriminatory tax would be invalid, but it held that "[t]here [is] no discrimination against the federal government within the State's tax scheme" (J.S. App. 36a). We disagree. Regulation 25 discriminates

against the United States and those who deal with it in two respects.[12]

First, if we are correct that the incidence of the tax is upon the purchasing facility rather than upon the out-of-state distiller, then the tax is discriminatory because all other retailers in the State who are required to pay a markup receive wholesaling, warehousing, and delivery services from the Tax Commission in exchange. The military facilities, however, receive no services whatsoever in return for the markup imposed on their direct purchases from out-of-state distillers (A. 37). It is no answer to say that the tax is nondiscriminatory because all retailers pay an identical markup of 17 or 20 percent. The military facilities, which perform their own wholesaling, storage, and delivery services, are differently situated from the State's licensed retailers, who receive their wholesaling services from the State. The equal treatment of persons who are differently situated is no less an invidious discrimination than the unequal treatment of persons who are similarly situated. Cf. *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500, *Lau* v. *Nichols,* 414 U.S. 563.

Second, if the legal incidence of the tax is deemed to fall upon the distiller rather than the military purchasers, then the tax is discriminatory because it is levied only upon those who deal with the United States

[12] Although the discriminatory effect of Mississippi's tax was not discretely briefed by the parties in the district court, the question was implicitly raised in the parties' general discussions of the State's taxing scheme, and the district court accordingly decided the issue, in our view erroneously.

and not upon those who deal with the State itself. A distiller who sells only to the State Tax Commission is free of any markup. A distiller who sells to the military facilities, however, is required to pay a 17 or 20 percent tax on each such sale. Under the decisions of this Court, the tax is invalid because it fails to "treat those who deal with Government as well as it treats those with whom [the State] deals itself" (*Phillips Chemical Co.* v. *Dumas Independent School District, supra,* 361 U.S. at 385).

II

THE UNITED STATES HAS NOT CONSENTED TO THE IMPOSITION OF THE STATE'S MARKUP TAX ON THE SALE AND DELIVERY OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE SUPPLIERS TO THE PURCHASING MILITARY FACILITIES LOCATED ON THE TWO EXCLUSIVELY FEDERAL ENCLAVES, AND MISSISSIPPI IS THEREFORE WITHOUT POWER TO TAX THOSE TRANSACTIONS

As applied to liquor sales by out-of-state suppliers to military purchasers on the bases over which the United States exercises exclusive jurisdiction, Mississippi's markup is constitutionally invalid for the wholly independent reason that the State lacks territorial authority to regulate the transaction by taxation or otherwise. This much was established by the Court's prior decision in this case: "with respect to the initial sale and delivery of the liquor by the suppliers to military facilities located in exclusively federal enclaves, nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction" (412 U.S. at 371). In the absence of congressional consent, therefore, "the Tax Commission [may] not attach its

markup to the sale and delivery of liquor by out-of-state suppliers to nonappropriated fund activities within Keesler Air Force Base and the Naval Construction Battalion Center" (*id.* at 373).

The district court concluded, however, that "Congress has legislatively acceded to Mississippi's markup on such wholesale liquor transactions" (J.S. App. 7a). Congressional consent was given, according to the court, in the Buck Act, which provides that "[n]o person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, * * * on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)). "Sales or use tax" is defined as "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property" (4 U.S.C. 110(b)).

The general consent given in Section 105(a), however, is qualified by Section 107(a), which provides that Section 105 "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *." The district court concluded that the Section 107(a) exception is inapplicable because "the legal incidence of the markup was intended to be levied upon and borne by the controlled wholesaler rather than the military purchaser" (J. S. App. 24a). But that holding, as we have shown, is bottomed on an erroneous definition of legal incidence.

For the reasons stated earlier in this brief, we submit that the Mississippi markup is a tax levied on an

instrumentality of the United States, to which Congress has not consented in the Buck Act or elsewhere. It follows that the State lacks territorial authority to tax the liquor transactions between the out-of-state distillers and the military purchasers on the exclusively federal enclaves. The markup is thus invalid as applied to those transactions, regardless of its validity as applied to sales to facilities located on the concurrent jurisdiction bases.[13]

III

THE MISSISSIPPI REGULATION IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT CONFLICTS WITH FEDERAL PROCUREMENT REGULATIONS AND POLICY

Regulation 25 is constitutionally invalid for yet another reason. It impermissibly interferes with the exclusive federal authority to regulate military procurement.[14]

---

[13] Moreover, with respect to those direct purchases in which title passes to the United States outside the jurisdictional limits of Mississippi and delivery to the bases is effected by the government, the Buck Act is also inapplicable because the sale does not occur "in whole or in part within a Federal area" (4 U.S.C. 105(a)).

[14] This argument applies with respect to all four military bases in Mississippi. The district court declined to reach this issue with respect to the exclusively federal enclaves, because it erroneously concluded that consent to a tax under the Buck Act foreclosed an independent challenge to the tax as an unconstitutional interference with military procurement regulations (J.S. App. 25a–26a, n. 21). But 4 U.S.C. 105(a) provides only that "[n]o person shall be relieved from liability for payment of * * * any sales or use tax levied by any State, * * * *on the ground that the sale or use * * * occurred in whole or in part within a Federal area*" (emphasis added). The section does

1. Article I, Section 8, of the Constitution gives Congress broad authority to "raise and support armies," to "provide and maintain a Navy," and to regulate "the land and naval Forces." In addition, Article IV, Section 3, empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In the exercise of its constitutional power, Congress has authorized the Secretary of Defense "to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces" on military bases (50 U.S.C. App. 473).

Pursuant to that delegation of plenary authority, the Secretary of Defense promulgated regulations establishing a uniform Defense Department policy governing the procurement and sale of alcoholic beverages by military facilities in the United States (32 C.F.R. 261). The regulations direct that "the purchase of all alcoholic beverages for resale at any * * * base * * * within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered" (32 C.F.R. 261.4

not preclude a challenge to a tax on some ground other than the one specified. Its effect is only to place enclaves on an equal footing with concurrent jurisdiction bases for purposes of state sales taxes. As the Senate Report stated, Section 105 "will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred" (S. Rep. No. 1625, 76th Cong., 3d Sess., p. 2).

(e)(1)). They also provide that, while it is the policy of the Defense Department to cooperate with local, state, and federal officials with respect to the procurement of alcoholic beverages, that "policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control" (32 C.F.R. 261.4(e)(2).[15]

2. Mississippi's Regulation 25 conflicts with the liquor procurement policy established by the Secretary of Defense in two respects. It frustrates the federal objective of obtaining alcoholic beverages on the most favorable competitive terms possible, and it impermissibly restricts the military's opportunity to choose among potential out-of-state liquor suppliers.

By requiring out-of-state distillers to collect a markup on every sale of alcoholic beverages to mili-

[15] Prior to 1966, the regulations expressed even more explicitly the Defense Department's policy against submitting to state control over the military's procurement of alcoholic beverages. They directed military facilities to obtain "the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*" 32 C.F.R. 261.4(e)(1) (1966 rev.) (A. 33). The Defense Department memoranda (A. 43–58) recommending the deletion of the italicized clause show that the purpose was solely to correct the misunderstanding of some clubs that the clause barred them from procuring liquor from monopoly or control states even if the state price was the most advantageous. In explaining the change, the Assistant Secretary of Defense for Manpower stated: "It would * * * remove any possible implication that negotiation with a state official must be avoided" (A. 58).

The amendment to the regulation thus left unchanged the basic procurement policy of seeking the lowest competitive price and the most favorable terms. Contrary to appellees' suggestion (Motion to Dismiss or Affirm, p. 5), the amendment in no way implied a submission to state regulation or price control.

tary facilities in Mississippi, Regulation 25 artificially inflates by 17 or 20 percent the price at which the military purchasers could otherwise obtain their liquor. In effect, it sets a floating minimum price level that is 17 or 20 percent above the "most advantageous" price. This state-imposed inflation of the price of liquor is irreconcilable with the federal policy requiring procurement of liquor at the lowest possible competitive price.[16]

The effect of the markup is to eliminate price competition between out-of-state suppliers and the State Tax Commission for sale of liquor to the military. It requires the out-of-state suppliers to sell at a total price, including the markup, that approximates the State's price for the same product. Although individual distillers are left free to compete among themselves on price, the distillers as a group are eliminated as a serious competitive threat with respect to military sales.

Putting aside for a moment the impact of the Twenty-first Amendment, we submit that the Supremacy Clause would bar Mississippi from imposing such a markup if it were related, for example, to the purchase of milk. In *Paul* v. *United States,* 371 U.S. 245, the Court invalidated under the Supremacy Clause California's minimum price regulation as applied to milk purchased by military installations from appropriated funds. The regulation was struck down because it was in conflict with federal procurement law and policy, which, like the regulation issued by the Secretary of Defense with respect to liquor procurement, required price competition "so that the United States may receive the most advantageous contract" (371 U.S. at 253). The Court stated (*ibid.*):

> While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law.

There was accordingly, the Court held, a clear and acute "collision between the federal policy of negotiated prices and the state policy of regulated prices" (*ibid.*).

The federal procurement regulation involved in *Paul* reflected "a policy 'to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered'" (371 U.S. at 252). The regulation tracked the general procurement statute, applicable to payments out of appropriated funds (10 U.S.C. 2303(a)), which requires that awards be made "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered" (10 U.S.C. 2305(c)). That procurement regulation, the Court held, "directs that negotiations or, wherever

[16] This is not, as appellees contend, "a wholly new contention" (Motion to Dismiss or Affirm, p. 3). We presented the argument in the district court originally, made it again in our brief in this Court at the time of the first appeal, and reiterated it in the district court on remand.

possible, advertising for bids shall reflect active competition" (371 U.S. at 253).

The regulations governing the procurement of alcoholic beverages for military installations closely parallel the language of the general procurement regulation involved in *Paul* and similarly reflect a federal policy of requiring "active competition so that the United States may receive the most advantageous contract" for the purchase of alcoholic beverages (*Paul, supra,* 371 U.S. at 253). Just as the California minimum price regulation in *Paul* collided with general federal procurement policy, the Mississippi markup regulation clashes with the military's liquor procurement policy.

In both cases, state policy disfavors the price competition required by federal regulations. California put a floor on the price of milk sold by private suppliers; Mississippi's regulation obliterates price competition between out-of-state private suppliers and the State's own wholesaling business. Though the means are different, the result is similar. Here, as in *Paul,* the federal policy of obtaining the lowest possible competitive price is frustrated. In addition to *Paul,* see *Public Utilities Commission* v. *United States,* 355 U.S. 534, where the Court held that California could not prohibit common carriers from transporting government property at rates other than those approved by its Public Utilities Commission, because that prohibition conflicted with government procurement law and regulations requiring negotiated

rates and the use of the " 'least costly means of transportation' " (see 355 U.S. at 542).[17]

In addition to its adverse impact on price competition for sales of liquor, Regulation 25 conflicts even more directly with federal procurement policy by purporting to limit the military's freedom to purchase alcoholic beverages from out-of-state sources other than distillers, such as wholesalers and importers. The regulation itself gives military facilities "the option of ordering alcoholic beverages direct from the distiller or from the * * * State Tax Commission" (App., *infra,* p. 48). The Tax Commission recently

[17] *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see 318 U.S. at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). It was on this basis that the Court in *Paul* distinguished *Penn Dairies* (see 371 U.S. at 254–255).

To the extent that *Penn Dairies* required, before finding a conflict between federal and state policy, unambiguous "evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable" (318 U.S. at 275), we think the decision has been eroded by *Public Utilities Commission* and *Paul.* In both cases, the Court was able to discern such a conflict on virtually no stronger indication of congressional purpose than was deemed insufficient in *Penn Dairies.* See 355 U.S. at 547–548 (Harlan, J., dissenting); 371 U.S. at 270–283 (Stewart, J., dissenting).

construed that provision to prohibit purchases by the military from any source other than a distiller. In a memorandum dated August 8, 1973, addressed to "all vendors" and sent also to the military purchasing facilities, the Tax Commission stated that the regulation permits the military to purchase liquor either from the State or "direct from the *distiller*" (emphasis in original) and that "[p]urchases are not to be placed with any other source" (A. 63–64).

Regulation 25, as interpreted by the State Tax Commission, is thus an effort to limit the military's sources of supply. This Court has never sanctioned such a state-imposed restriction on a uniquely federal function. In *Mayo* v. *United States,* 319 U.S. 441, this Court invalidated a Florida fertilizer law insofar as it would have required agents of the United States Department of Agriculture, as a condition to distributing fertilizer pursuant to the Soil Conservation and Domestic Allocation Act, to submit the fertilizer for state inspection and to pay an inspection fee to the State. "[T]he activities of the Federal Government," the Court declared, "are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible" (319 U.S. at 445, footnote omitted).

The state inspection program in *Mayo* served a compelling public purpose: "to assure the consumers that they will obtain the quality of fertilizer for which they pay and that substances deleterious to the land will be excluded from the material sold" (*id.* at 442). That did not, however, justify the exaction of a fee from the United States as a precondition to "executing a function of government" (*id.* at 447). "Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty" (*ibid.*).[18]

The principles of *Mayo* are applicable here. Military procurement is a federal function that is constitutionally immune from state interference. The Supremacy Clause forbids a State from dictating to the military what suppliers it may negotiate with and purchase from. That is as true with respect to the procurement of alcoholic beverages as it is with respect to the procurement of rifles.

The nonappropriated fund activities on the four Mississippi bases are as "free from regulation by any state" as were the Agriculture Department employees in *Mayo* (319 U.S. at 445). Mississippi's effort to limit the military's sources of liquor supply impedes the federal procurement function by restricting the range of potential competitors for the military's business. Regulation 25 thus collides with the procurement policy expressed by the applicable Defense Department regulation, it interferes with an important "function

[18] See also *Johnson* v. *Maryland*, 254 U.S. 51, invalidating a state law that penalized a Post Office employee for operating a government vehicle without a state license, and *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187, holding that a State may not require a government contractor to obtain a license prior to executing the contract and performing construction work on an Air Force base within the State. As this Court stated in *Johnson*, a State may not impose "qualifications in addition to those that the Government has pronounced sufficient" (254 U.S. at 57).

of government" (*id.* at 447), and its application to the military facilities in Mississippi is forbidden by the Constitution.

3. Does the Twenty-first Amendment permit Mississippi to defeat military liquor procurement policy by suppressing price competition and forbidding purchases from unapproved sources? There is nothing in the history of the Amendment to suggest that it was intended to diminish the exclusive congressional authority to regulate military affairs. The Amendment removes certain Commerce Clause restrictions to state liquor controls and gives the states broad authority to regulate, in furtherance of the public health, welfare, and morals, the sale, distribution, and use of alcoholic beverages within their territorial jurisdiction.

That authority, however, does not include the power to intrude upon federal functions. The military's freedom from state regulation "is inherent in sovereignty" (*Mayo, supra,* 319 U.S. at 447). Though the State's authority over liquor is broad and may serve important public purposes, the authority must be exercised in such a way that "the federal function [is] left free" (*ibid*). What this Court stated in *Mayo* is no less applicable where the subject matter is federal procurement of alcoholic beverages. Under the Supremacy Clause, a State may not regulate the activities of the federal government. "No other adjustment of competing enactments or legal principles is possible" (*id.* at 445). The Twenty-first Amendment is not an exception to that fundamental rule of federal supremacy.

CONCLUSION

The judgment of the district court should be reversed and the case should be remanded with directions to enter an appropriate decree.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
JONATHAN S. COHEN,
RICHARD FARBER,
Attorneys.

MARCH 1975.

APPENDIX

Constitutional Provisions, Statutes, and Regulation Involved

1. Article I, Section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
> To raise and support Armies, * * *
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> * * * * *
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, Section 3, provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Article VI provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. Section 105(a) of the Buck Act, 61 Stat. 644, 4 U.S.C. 105(a), provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Section 107(a) of the Act, 61 Stat. 645, as amended, 4 U.S.C. 107(a), provides:

> The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

Section 110 of the Act, 61 Stat. 645, 4 U.S.C. 110, provides in part:

> As used in sections 105–109 of this title—
> (a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

> (b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.
>
> * * * * *
>
> (c) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

3. Section 67–1–41 of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code 1972, § 67–1–41, provides in part:

> The state tax commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the state, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the commission. The said commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the state including, at the discretion of the commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the state, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and

proper in keeping with the provisions and purposes of this chapter. * * *

Miss. Code 1972, § 27–71–11 provides in part:

> The commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the state wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

4. Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
MAR 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMY WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF FOR THE APPELLEES

A. F. SUMMER
Attorney General
State of Mississippi

JAMES H. HADDOCK
Chief Attorney, Mississippi Tax Commission

ROBERT L. WRIGHT
Washington, D. C.
Special Counsel to the Mississippi State Tax Commission

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

ARGUMENT 1

INTRODUCTION 1

I. The Buck Act Authorizes The Tax

A. The Tax Was Levied on Wholesale Sales... 2

B. The Decisions of This Court Support the Constitutionality of the Tax 4

C. Section 6 of the Draft Extension Act of 1951 Did Not Amend the Buck Act 8

II. The Tenth and Twenty-First Amendments Sustain the Tax 11

III. The Tax Immunity Decisions of This Court Do Not Bar State Sales Taxation That Increases Defense Costs 18

IV. There is No Conflict Between Mississippi's Regulation and Federal Procurement Policy... 21

CONCLUSION 23

APPENDIX 25

CITATIONS

CASES:

Alabama v. King & Boozer, 314 U.S. 1 .....19, 20
Collins v. Yosemite Park Co., 304 U.S. 109 .....1, 4, 5
Esso Standard Oil Co. v. Evans, 345 U.S. 495 10
First Agricultural Bank v. State Tax Commission, 344 U.S. 339 20
Heublein Inc. v. South Carolina Tax Commission, 409 U.S. 275 .....12, 13
Howard v. Commissioners, 344 U.S. 624..... 7
James v. Dravo Contracting Co., 302 U.S. 134..6, 13, 18, 19
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110..... 21
McCormick & Co. v. Brown, 286 U.S. 131 .....11, 12

Page

National Distillers v. State Board, 83 Cal. App. 2nd 35, 187 Pac. 2d 821 11
Ohio v. Helvering, 292 U.S. 360 .....13, 23
Paul v. United States, 371 U.S. 245 22
Polar Ice Cream Co. v. Andrews, 375 U.S. 361 .....7, 8
Sullivan v. United States, 395 U.S. 169 .....9, 10
United States v. County of Allegheny, 322 U.S. 174... 10
United States v. City of Detroit, 355 U.S. 466 15
United States v. Constantine, 296 U.S. 287 12
United States v. State Tax Commission of Mississippi, 378 F.Supp. 558 .....2, 20, 22
United States v. State Tax Commission of Mississippi, 412 U.S. 363 .....4, 5
Vance v. Vandercook, 170 U.S. 438 23

CONSTITUTION, STATUTES AND REGULATIONS

Buck Act of 1940 .....2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 19, 21
Draft Extension Act of 1951 .....8, 9
10th Amendment 11, 12
18th Amendment 11
21st Amendment 11, 12
Michigan Statutes Annotated 16
Mississippi Code Annotated 2, 3, 14
Michigan Liquor Control Regulation, 1954 16
Mississippi Liquor Control Regulation, 1966.....3, 14

MISCELLANEOUS:

Navy Exchange Manual 8
U.S. Senate Report No. 1625, 76th Cong. 3rd Session 7, 25-33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMY WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi

---

BRIEF FOR THE APPELLEES

ARGUMENT

Introduction

The appellant initially argued that Mississippi could not tax sales made on bases subject to exclusive federal jurisdiction because the 21st Amendment did not extend state jurisdiction. Relying upon *Collins* v. *Yosemite Park Co.,* 304 U.S. 518 (1938), this Court accepted that

argument but remanded the case for a ruling as to whether the 1940 Buck Act authorized such a tax. The Court below has now found that the purpose of the Buck Act was to extend state taxing jurisdiction to such bases, for any tax measured by sales, and that Mississippi's wholesale mark-up is such a tax.

Appellant now argues that the Buck Act exempts military retailers from this tax because the tax is levied on them instead of upon sales to them; that collection of the tax from them by the suppliers who pay it, shifts the legal incidence to the retailers. The opinion below found the Buck Act's exemption (4 U.S.C. § 107(a)), inapplicable because the state's tax was levied upon wholesale sales and not upon the military purchasers. 378 F.Supp. 558, 568-69.

The Court below recognized, as we do, that the Buck Act's territorial extension of state sales tax jurisdiction left intact the constitutional freedom of federal instrumentalities from state action that interferes with federal functions. We shall support its decision by showing that the burden imposed on military retailing by Mississippi's wholesale mark-up is not an unconstitutional burden.

I. THE BUCK ACT AUTHORIZES THE TAX

A. The Tax Was Levied on Wholesale Sales

Mississippi has three levels of alcoholic beverage taxation. First, the state taxes consumers of beer, wine, and distilled spirits by levying a flat 5% tax on consumer purchases of all commodities. While the tax is normally collected and paid by retailers they must, by law, collect it from their purchasers, Miss. Code Ann. (1972) Sec. 27-65-17 and Sec. 27-65-31).

Second, the state taxes retailers of wine and spirits by imposing on them, gallonage taxes varying with alcoholic content from $.35 to $2.50 per gallon. Miss. Code Ann. (1972), Sec. 27-71-7. This tax is a fixed cost of doing business, included in the price paid by the retailers' customers. Its economic burden is passed on to the consumer, but its legal incidence is on the retailer. The retailer alone is bound by law to pay it and he pays it for the privilege of selling these beverages to consumers.

Third, the state taxes the business of wholesaling wine and spirits by levying a standard percentage mark-up on their wholesale cost. Miss. Code. Ann. (1972), Sec. 27-71-11. Any wholesale mark-up is necessarily included in the price charged to the retailer. While the economic burden of this tax is temporarily born by the retailer, who passes it on to consumers, the tax must be paid by the wholesaler for the privilege of selling these beverages to retailers. Only the wholesaler, whether it be the state or a distiller, is liable for payment of this tax into the state treasury.

Mississippi's Alcoholic Beverage Commission has created by regulation, an option which allows the military retailers by buy either "direct from the distiller" (A. 37) or from the state, providing that when such direct purchases are made, the distiller shall first pay the wholesale mark-up to the state and then collect it from the purchaser. (A. 38).

The distiller's liability for the tax does not depend on its collection from the military retailers and is enforcible by revocation of the distiller's license to exploit Mississippi's market. No distiller is bound to sell to the military retailers but when it does it is

bound to pay the mark-up without any deduction for its wholesaling costs (Par. 13 Stipulation, A. 37). No distiller has protested or could protest this burden since it is voluntarily assumed.

Appellant's latest brief argues that the tax is discriminatory because the military retailers perform wholesaling services similar to those performed by Mississippi and the distillers. (p. 30) But the trial record discloses no such conduct nor is there any authorization for military wholesaling in the regulations here involved.

This argument seems to recognize that the tax is on wholesale transactions but the main thrust of appellant's argument is that what Mississippi meant to be a tax on wholesale sales is in law a tax on retailers. This Court's decisions do not permit such a distortion.

B. The Decisions of This Court Support the Constitutionality of the Tax

In our prior argument, we pointed out that *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938), had sustained a California wholesaler's excise tax on all liquor sales made to a federal concessionaire in Yosemite Park for resale there. That was a federal enclave where California had reserved taxing rights and this Court rejected our claim that the 21st Amendment permitted such taxation. The ground of decision was that the amendment had not extended the state's jurisdiction over federal enclaves. The California tax was upheld, this Court said, only because California had reserved its taxing rights in ceding the enclave. 412 U.S. 363, 375.

The Yosemite case was decided two years before the passage of the Buck Act. Instead of determining itself the Buck Act's effect on Mississippi's case, this Court remanded that question to the lower Court. 412 U.S. 363, 379. That Court has now considered the Buck Act and correctly found that the Buck Act makes taxing reservations as to federal enclaves unnecessary for any state tax *measured by sales*. This case is therefore now indistinguishable from the Yosemite case, insofar as a wholesalers' excise tax on sales made to a federal instrumentality for resale is concerned.

If, as the appellant now argues, the legal incidence of Mississippi's tax is upon a federal instrumentailty because it was collected from a federal retailer, the Yosemite case was wrongly decided. California's reservation of its power to tax such sales on a federal enclave and the Buck Act's general grant of state power to tax such sales, are both subject to the constitutional restriction against directly laying taxes on a federal instrumentality. The federal retailer in that case was just as much a federal instrumentality as the military retailers in this case. The fact that the tax was collected from a federal instrumentaility did not make it an unconstitutional tax, in either case. Both there and here the tax is saved from being an unconstitutional burden on the United States because it was levied on wholesale sales.

In the Yosemite case California's excise tax was collected directly from the federal retailer because it had bought its alcoholic beverages out of the state. That excise tax was imposed upon "all beer and wine sold in the state by a manufacturer or importer" and upon "all distilled spirits sold in the state by rectifiers or wholesalers," (304 U. S. 518, footnote 19 at 531-32). Payment had to be evidenced by revenue stamps, nor-

mally bought by an importer or wholesaler doing business in the state.

The California liquor control board had ruled that the federal retailer must buy the required stamps and thus pay the tax on these out of state purchases (Ibid. at p. 535-36). In upholding this ruling, the Court rejected a claim that collection of the tax not only interfered with an agent of the United States but was actually partly collected from the national government itself, because of its contractual interest in the profits of the federal retailer. The ground of rejection is equally applicable here, i.e., that the United States has consented to such a tax (Ibid at p. 536).

The Buck Act is just as effective federal consent to such sales taxation as the United States' acceptance of California's taxing reservation was in the Yosemite case.[1] Unless the Court is now prepared to overrule this aspect of the Yosemite decision, the decision below must be affirmed. Yet this Court's later decisions construing the Buck Act offer no basis for overruling its 1938 decision in the Yosemite case.

Whether sales of goods or services to the federal government are involved this Court has permitted state taxation of such transactions under the Buck Act. In 1954 the Court upheld the levy of a Louisville,

---

[1] The Senate Report, No. 1625, 76th Cong., 3rd Session, reprinted in full as an appendix to this brief, states that the Buck Act was intended to nullify the 1937 holding in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, that transactions on exclusive jurisdiction enclaves could not be taxed (*infra*, pp. 28-29). There is no mention of the 1938 holding in the Yosemite case referred to above. If, as appellant contends, the Buck Act was meant to exempt sales to federal retailers from such taxation, that more recent case would certainly have been noted as also nullified.

Kentucky, occupational tax, upon employees of a federal ordinance plant, located on an enclave over which the federal government had exclusive jurisdiction. *Howard* v. *Commissioners,* 344 U.S. 624. A dissent on the ground that the Buck Act did not grant consent to state taxation for the privilege of doing business with the United States was answered as follows: "The grant was given within the definition of the Buck Act and this was for *any tax* measured by net income, gross income, or gross receipts." 344 U.S. 624, 629.

Appellant's Point II (p. 31-33) wrongly assumes that the Buck Act did not wipe out all distinctions between exclusive and concurrent jurisdiction enclaves for state sales tax purposes. The Louisville case said it did. 344 U.S. 624, 627. That case held that assertion of a right to tax sales on federal enclaves does not interfere with any jurisdiction asserted by the federal government, whether its jurisdiction is exclusive or concurrent. If, on the other hand, a state tax is laid on a federal instrumentality, the Buck Act exemption applies alike to exclusive and concurrent jurisdiction enclaves.

Polar Ice Cream Co. v. *Andrews,* 375 U.S. 361 (1964), sustained a Florida wholesaler's tax on milk bought by post exchanges, measured by the volume sold. It construed that tax, as this one must be construed, as a tax levied on wholesaling. Although the economic burden was born by exchanges on exclusive jurisdiction enclaves, its collection from them by the wholesaler did not invalidate the tax. As to the Buck Act the Court said:

> "We think this provision provides ample basis for Florida to levy a tax measured by the amount of

milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida." 375 U.S. 361, 383.

As the Navy's own post exchange regulations show, the Defense Department itself does not regard enforced collection of a tax on wholesale sales from an exchange purchaser as a tax on the exchange.[2] Appellant's argument impliedly assumes that some federal legislation must have given military retailers of liquor an immunity from state sales taxation that post exchanges do not have. We shall therefore consider what, if any, effect on the Buck Act resulted from passage of the Draft Extension Act in 1951, the federal statute authorizing military liquor sales.

C. Section 6 of the Draft Extension Act of 1951 Did Not Amend the Buck Act

The statutory authorization for selling liquor on military bases is Section 6 of the Draft Extension Act of 1951, 50 U.S.C. App. 473. That section authorizes the Secretary of Defense to establish criminally enforceable regulations applying to "sale consumption, possession of or traffic in" beer, wine or liquor "to or by" military personnel, "at or near" military bases.

Section 6 was a non-controversial amendment, adopted by agreement on April 13, 1951, just before the

[2] Section 2634 of the Navy Exchange Manual states that a sales tax imposed on a supplier is valid, even where it is "his *obligation to collect* and pay it." (Emphasis ours) A.62. The Senate Report said as to non-appropriated fund instrumentalities, such as post exchanges, property "purchased from them" would be subject to state taxation if they were not to be federal instrumentalities. (See p. 30, *infra*.). But there is no suggestion that purchases by them would be exempt, in any event.

House passed the 1951 Draft Extension Bill, designated as S1, 82nd Congress (97 Cong. Rec. Part 3, p. 3914). This amendment was offered by Congressman Cole of New York as a substitute for an amendment offered a few minutes earlier by Congressman Bryson of North Carolina. Bryson's would have prohibited sale or possession of any beverage containing an alcoholic content of more than one-half of one percent at any selective service training camp. Ibid, p. 3902. Cole then offered his substitute amendment as better adapted to dealing with military alcoholic beverage problems, because Bryson's "applies only to the Training Corps and not to all camps and posts of the armed forces." Ibid. p. 3902. This history conclusively established this section as a temperance measure; not meant to provide the armed forces with tax-free liquor. Certainly if this statute had been meant to divest the states of their control of purchase or importation it would have said so and could not have been enacted without debate.

The Secretary's regulation (A. 31-36) directs the military purchasers to consider all factors, including price (A. 33, 35). But an initial direction in the regulation to seek supplies "without regard to state law," was withdrawn before Mississippi adopted its regulation (A. 35). Neither the regulation nor the authorizing statute mentions taxation.

Section 6 of the Draft Extension Act was no more an amendment of the Buck Act than the Soldiers and Sailors Civil Relief Act was. In *Sullivan* v. *United States*, 395 U.S. 169 (1969), a serviceman claimed that this 1942 Act had relieved him of state sales and use taxes on merchandise purchased from private sellers. The Court held that it did not, basing its ruling on the

fact that the Relief Act says nothing about sales or use taxes, which had been explicitly dealt with in 1940 in the Buck Act.[3] The Court construed the Buck Act's federal instrumentality exemption as follows:

> "In the 1940 Buck Act, Congress provided that the States have 'full jurisdiction and power to levy and collect' sales and use taxes in 'any federal area,' except with respect to the sale or use of property *sold by* the United States or its instrumentalities through commissaries, ship's stores, and the like." 395 U.S. 169, 178 (Emphasis ours).

Like the 1942 Relief Act, the 1951 Draft Extension Act, said nothing about any of the matters dealt with in the Buck Act and was certainly not meant to give military retailers of liquor a freedom from taxation of their *purchases* not enjoyed by military retailers of necessities such as milk.

In short, the Buck Act authorized state taxation of sales of alcoholic beverages to federal agencies on enclaves where United States jurisdiction is territorially exclusive. We now turn to the doctrine of sovereign immunity, as it applies to taxation of dealers in alcoholic beverages.

---

[3] The exemption provided was from state taxation of a serviceman's personal property outside his home state and this Court noted the traditional distinction between property taxes and taxes "on the privilege of selling or buying property." 395 U.S. 169, 175. That distinction is ignored by appellant in its reliance on *United States* v. *County of Allegheny*, 322 U.S. 174 (1943). (p. 15) The reasons for the distinction are discussed in *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 499-500 (1952). That case distinguished the Allegheny County case in upholding a tax on the privilege of storing gasoline owned by the United States.

II. THE TENTH AND TWENTY-FIRST AMENDMENTS SUSTAIN THE TAX

The 21st Amendment was passed to end the failed experiment in federal liquor control that the 18th had made possible. Whatever else it may have done, the 21st restored to the states all of the powers over the liquor traffic that they had before the 18th. One traditional method of exercising such power has been exclusive state operation and ownership of the business of wholesaling alcoholic beverages. Another such method has been excise taxation of state licensed private wholesalers.

As we have shown, in the Yosemite case this Court allowed California to collect its excise tax on all sales to a federal concessionaire, while denying California the right to collect license fees from that federal instrumentality. The Buck Act was passed two years after that decision and California now collects its excise tax on sales made to all federal enclaves within the state. See California Revenue and Taxation Code. Sec. 32201. It also collects the tax upon purchases made from out-of-state suppliers by federal hospitals located in the state. See *National Distillers* v. *State Board,* 83 Cal. App. 2nd 35, 187 Pac. 2d 821 (1947).

Appellant's brief mistakenly assumes that the 10th Amendment has no application to this case. This Court has said that state liquor laws derive their force "from power originally belonging to the states and preserved to them by the 10th Amendment."[4] *McCormick & Co.* v. *Brown,* 286 U.S. 131, 141 (1932).

---

[4] That amendment "reserved to the States" the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."

In that case the Court held that even during national prohibition, when federal law played the main role in controlling the liquor traffic, West Virginia could define intoxicating liquor in a more stringent way than the United States had, in deciding what products could be brought into the state. After repeal, the Court again affirmed state supremacy in the field of liquor control under the 10th Amendment. *United States* v. *Constantine,* 296 U.S. 287, 295-96 (1935). There the Court held that the federal government's power to tax retail liquor dealers did not permit the United States to impose a *punitive tax,* based on a dealer's violation of state law.

A state's Tenth Amendment right to tax liquor sales is not limited by the Supremacy Clause. The Constitution allows the United States to tax liquor for its purposes but does not preclude taxation by a state for its purposes. Each state has so far maintained its own tax policy with respect to liquor sales without interference from the federal government. While the recent case of *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972) was not decided upon constitutional grounds, it is an example of the kind of deference to state liquor taxation that both the 10th and 21st Amendments were meant to assure.

South Carolina taxes both wholesale sales of liquor and the net income derived by national distillers upon their sales to the state's wholesalers. Heublein contended that this income tax violated a federal statute designed to limit state taxation of a national business's net income because South Carolina compelled Heublein to engage in taxable business activity within the state that served no business purpose of Heublein. South

Carolina required that the initial sale by Heublein be made to a local agent, who then ships to its wholesalers from a state licensed warehouse. Ibid at 278. This requirement was sustained as "reasonably related" to the state's liquor control purposes. Ibid at 283.

But federal deference to state liquor control stops short of an immunity from federal taxation of state wholesaling monopolies, such as Mississippi's. *Ohio* v. *Helvering,* 292 U.S. 360 (1934), established that when a sovereign state engages in a business to raise revenue, non-discriminatory federal taxation of the business is not an unconstitutional burden on sovereignty. In that case, Ohio sought to avoid the imposition of license fees and the federal excise tax on liquor bought by the state for resale through state-owned stores. Since these stores were instrumentalities by which Ohio exercised "governmental powers" (Ibid at 368) Ohio claimed that federal taxation of its liquor business impaired its sovereignty. The Court answered that when a state chooses to engage in business, that "is not the performance of a governmental function" (Ibid at 369) and the tax was sustained.

Intergovernmental tax immunity doctrine is "a principle resulting from our dual system of government." *Ohio* v. *Helvering,* 292 U.S. 360, 368. The reasoning and practical criteria adopted by the Court in determining exemption from a federal tax "are clearly applicable to a state tax on earnings under a contract with the Federal Government." *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 157 (1937). Appellant's argument implies that there is some reason of constitutional policy for holding that Mississippi's taxation of sales to federal retailers illegally burdens a sovereign function, while federal

taxation of state-owned retailers does not. We shall therefore note below the similarities and differences in the impact on sovereign functions of Mississipp's tax and the federal excise tax.

First, Mississippi buys and sells liquor at a profit with the net proceeds of the operation going into Mississippi's treasury and becoming usable for all state purposes. Miss. Code Ann. (1972) Sec. 27-71-29. The military retailers in Mississippi operate with non-appropriated funds and the profits of their operations never reach the federal treasury (A. 30).

Second, Mississippi's profits are used to supply essential public services used by all persons residing within the state, whether military or civilian, temporary or permanent. The military retailers' profits are used for the exclusive benefit of the particular mess or club that generates them (A. 40-41). These benefits are no more essential to the maintenance of armed services' morale than the public services provided by Mississippi's taxes are.

Third, Mississippi's wholesale mark-up is applied uniformly to all retail liquor businesses in the state, military and civilian. But Mississippi exempts the military from its consumers' sales tax and its retailers excise tax (A. 36) allowing the military retailers to both sell and buy liquor at substantially lower prices than private retailers. The federal excise tax is also uniformly applied to all distilled spirits, whether bought by state or private wholesalers, but there is no forgiveness of any federal taxes on the state's business. Thus while Misissippi discriminates in favor of the military retailers the United States does not discriminate in Mississippi's favor.

Fourth, Mississippi's mark-up is an element of cost that is passed on to retail purchasers and their customers. The federal excise tax is also an element of cost that is presently passed on to both military and civilian customers of all retailers. But if the United States wished to assure its military personnel of even lower liquor prices than they now get from the military retailers it could, of course, rebate to military purchasers all or a part of its $10.50 per proof gallon tax on distilled spirits. See 26 U.S.C. Sec. 5001(a)(1).

One way to see the policy questions raised by the appellant's argument is to try and visualize the Congressional debate that such a proposal might provoke. The Congress would first be asked to decide whether liquor should be retailed on military bases at prices more than ten percent below those charged by civilian retailers in the same area; the limitation now stated in 3(b) of the Defense Department regulations (A. 34). Debate would then occur as to whether this should be done at the expense of state or federal liquor revenues or both. A policy judgment would only emerge after due consideration of the impact of such reduced liquor prices upon the welfare of military personnel and upon the welfare of the states. Whether any resulting federal invasion of a state's right to control the liquor traffic within its borders violated the 10th or 21st Amendments would then be left for determination by this Court.

This Court has recognized that the complex problems raised by such political and economic considerations "are ones which Congress is best qualified to resolve." *United States* v. *Detroit,* 355 U.S. 466, 474 (1958). Yet the appellant is asking this Court to originate a policy in favor of extraordinarily low prices for federal

military personnel at the expense of state revenues alone. Dressing the argument in the language of constitutional debate cannot disguise the true nature of the issue; which is, may this Court declare as federal policy a matter properly resolvable by the Congress?

Moreover, the invitation for a judicial resolution of this controversy is remarkably belated. Another monopoly state, Michigan, amended its Liquor Control Act on May 5, 1954, to require the military to purchase from the state stores and authorized its Liquor Control Commission to give the military retailers a discount from the state stores' retail prices.[5] On May 17, 1954, the Michigan Commission issued the following order:

> "DISTILLED SPIRITS VENDORS AND THEIR REPRESENTATIVES
>
> Attention: Executive office in charge of Monopoly State Operations
>
> An Amendment to Section 16 of the Michigan Liquor Law, effective May 5, 1954, provides that military installations must now purchase all spirits from the State Stores of the Michigan Liquor Control Commission and cannot purchase directly from the distillers as has been the practice in the past.
>
> Therefore, the Liquor Control Commission has ordered that effective June 1, 1954, no further

[5] Section 3 of Michigan Liquor Control Act of August 8, 1933, prohibited importation of liquor into the state "unless the sale or delivery is made by the Commission or its authorized agent or distributor." Michigan Statutes Annotated, 18.973. Public Acts 1954, No. 175, applied this policy to "military establishments located in the state" by authorizing the Commission to establish prices on sales to them" by rule or regulation." Michigan Statutes Annotated 18.987.

> shipments shall be made by any distillers directly to the aforementioned installations. Any sales made beyond June 1, 1954, will constitute a violation of the Michigan law and subject the distiller to stringent penalties."

Michigan has thus been collecting a wholesale mark-up[6] from all the military bases in that state, about five times the number in Mississippi, for more than 20 years without any legal challenge from the Defense Department.[7]

No explanation has been offered as to why the Department delayed its attack on a monopoly state's right to apply its mark-up to military sales for fifteen years. It is also odd that the aim of this appeal, even lower liquor prices for military retailers than they are now paying, contradicts the aims of the Department stated in this record. In his initial memorandum summing up the Department's position as to price negotiations with the monopoly states, Assistant Secretary Morris said that a satisfactory price was one which would allow "an adequate profit to the installation." (Ex. 8, A. 44)[8] No attempt was made below

[6] Like Mississippi, Michigan fixes the amount of the state's mark-up on sales to military bases by regulation. However, Michigan fixes the amount by allowing a 22% discount from the prices charged by its stores to their retail customers. See Rule 436.601.

[7] The memorandum from Navy Under Secretary Baldwin to Defense Assistant Secretary Morris, dated April 22, 1966 (Exhibit 9, A. 46) states that the "net mark-ups over costs to state stores imposed upon Military Messes" then imposed by Michigan, Oregon, and Washington were about 30%, 70%, and 45% respectively. Yet there has been no legal challenge to any of these other monopoly state mark-ups.

[8] In his final memorandum (Exhibit 13) he said the deletion of the language "without regard to prices locally established by state statute or otherwise," "would not require nor would it preclude

to show that Mississippi's regulation, which gave the military retailers both profits and a lower price than private retailers pay, did not yield an "adequate profit." The case was prosecuted on the theory that the price could not lawfully include any state mark-up, no matter how reasonable it might be.

Since military functions are involved we shall examine in the next section, this Court's intergovernmental tax immunity doctrine, as applied to military expenditures.

III. THE TAX IMMUNITY DECISIONS OF THIS COURT DO NOT BAR STATE SALES TAXATION THAT INCREASES DEFENSE COSTS

A turning point in the development of intergovernmental tax immunity doctrine was *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). In that case West Virginia taxed a construction contractor's receipts from work performed for the federal government on federal enclaves.

After noting that close distinctions must be made in tax immunity cases "without unduly limiting the taxing power which is equally essential to both nation and state under our dual system (Ibid at 150), the opinion comprehensively reviews the Court's prior decisions in this field (Ibid at 151-161). It then concluded, as to concurrent jurisdiction enclaves, that notwithstanding the resulting increased cost of federal projects, the tax did not "interfere in any substantial way with the performance of federal functions and is

---

negotiations with the states for the most advantageous contract with the Government." (A. 56). Yet the complaint alleged that mere collection of the mark-up was unlawful, with no allegation that the military retailers had tried to negotiate more advantageous mark-up (A. 6-11).

a valid exaction." Ibid at 161. As to the enclaves whether the federal government had exclusive jurisdiction the Court held that these contractor's receipts were beyond the state's taxing power. Ibid at 140. It was this latter aspect of the decision that Congress nullified by the Buck Act. (*Infra*, pp. 28-29).

Ever since *James* there has been no doubt that a non-discriminatory state tax on sales to the United States, does not unconstitutionally burden a federal function. This issue arose again in *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941), when the Solicitor General tried to limit *James* to its own facts. The Solicitor General agreed with the *James* "legal incidence" test for valid state taxation of federal contractors, as opposed to "economic incidence." However, the Solicitor General argued that the legal incidence of Alabama's sales tax was on the federal government because the federal government was legally bound to pay it.

The Court adhered to its legal incidence test but rejected the result the Solicitor General urged upon it. While the Court recognized that a cost-plus contract legally bound the federal government to pay the amount of the tax to the contractor, this fact merely determined the economic incidence of the tax and was therefore irrelevant. Since the intention of the state was to tax the contractor's business, the fact that he in turn was doing business with the United States on a cost-plus basis could not shift the legal incidence to the federal government.

That case was a sound application of *James*, and as the Court below noted, it has never been overruled. 378 F.Supp. 558, 566. As in *James* and *King & Boozer* the tax here was added to the cost of federal

procurement but was not aimed at any function performed by the United States. It stemmed instead from Mississippi's lawful control of a wholesale liquor business. Unlike the increase in military construction costs resulting from the state tax sustained in *King & Boozer,* Mississippi's tax has been applied only to military *purchases for resale* with the economic burden passed on to the ultimate consumer.

Appellant's reliance on *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339 (1968), as a constitutional law holding is unwarranted. The Court never even reached "the constitutional question of whether today national banks should be non-taxable as federal instrumentalities." Ibid at 341. The Court held that national banks had a congressionally established immunity from all forms of state taxation except as to real property and bank shares (Ibid at 346) and declined to apply to the Bank's purchases a Massachusetts retail sales tax levied, like Mississippi's retail sales tax, on purchasers. Ibid at 348. As the Court below pointed out, Mississippi's wholesale mark-up was a tax levied on wholesale sales, instead of on purchasers, and the bank case is also inapposite for that reason. 378 F.Supp. 558-69.

Mississippi's law and regulation merely established a percentage wholesale mark-up without fixing wholesale prices. Enforcement could not prevent practical absorption by a distiller's reduction of its wholesaler's price. Mississippi could only insist that the distiller try to collect whatever sum was designated on the invoice as the mark-up and that the mark-up be the stipulated percentage of what the invoice showed as the wholesaler's price.

We do not disagree with appellants contention that the practical effect was to require the private suppliers to sell the military retailers "at a total price, including the mark-up, that *approximates* the state's price for the same product." (Emphasis ours, p. 36). But if there was any other reason for dealing directly with the distillers than an opportunity to shave the state's price it does not appear in this record.[9]

Thus Mississippi's mark-up bears no resemblance in its legal or practical effect to Massachusetts' sales tax. Nor can any rational contention be made that the Buck Act's exemption was meant to have a practical or legal effect comparable to the statutory exemption of national banks.[10]

We respectfully submit that no theory of intergovernmental tax immunity ever sanctioned by this Court could relieve these military retailers from payment of Mississippi's non-discriminatory wholesale mark-up, on their purchases of alcoholic beverages.

IV. THERE IS NO CONFLICT BETWEEN MISSISSIPPI'S REGULATION AND FEDERAL PROCUREMENT POLICY

Appellant argues that the tax impermissably interfers with federal procurement policy because it restricts price competition for the business of federal retailers. This argument is not based upon the federal statutory policy in favor of competitive procurement,

---

[9] The military retailers offered no evidence as to why they deemed dealing directly with distillers more advantageous than dealing with the State.

[10] Appellant's reliance on *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, is even less rational. The Arkansas statute in that case expressly exempted purchases by the United States (*Ibid.* at 112) and the Court construed the Armed Services Procurement Act as making the United States the purchaser in question. *Ibid.* at 116.

which does not apply to non-appropriated fund instrumentalities. *Paul* v. *United States,* 371 U.S. 245, 269. The sole basis for the argument is the Secretary of Defense's regulation directing military purchasers to obtain "the most advantageous contract, price, *and other factors considered.*" (A. 33). (Emphasis ours.)

There is no conflict between this directive and Mississippi's tax policy because the directive does not mention taxes. Moreover, Mississippi permits unlimited competition between distillers in pricing their products. The only restriction is that the prices to all retailers shall be a standard and reasonable percentage of a wholesaler's price, individually set by the distillers. 378 F.Supp. 558, 572.

The regulation's option to purchase from the state at the standard percentage over wholesaler's cost, established a price ceiling for the military retailer's direct purchases from distillers that could hardly be called disadvantageous. The factor of compliance with state law by payment of a non-discriminatory wholesale sale tax, is an inescapable factor for consideration.

Another factor is the aspect of unfair competition considered in the Defense Department's own regulation. In restricting resale prices to not more than ten percent below those of civilian retailers in the same area (A. 34), the Department recognized the desirability of preventing cut-throat competition with private enterprise. In view of the substantially lower prices at which military purchases were made, as a result of their exemption from the state's gallonage taxes, it is apparent that even lower prices might have encouraged lower resale prices than the regulation permits. The Defense

Department's stated aim of reasonable profits would be changed to exorbitant profits if an even greater profit margin were added to the economies provided by operating on government property.

Competition between wholesalers is of course prevented by Mississippi's pre-emption for itself of the state's wholesale liquor business. But the legality of such pre-emption was established in 1898 in *Vance* v. *Vandercook,* 170 U.S. 438 and again recognized in 1934 in *Ohio* v. *Helvering,* 292 U.S. 360.

The cases cited by appellant that invalidated state regulations are all based upon an explicit conflict with federal statutes and do not concern alcoholic beverages. It there were such a conflict here, we believe that the 10th and 21st Amendments would resolve it in favor of the state. But in the absence of such a conflict there is no state-federal policy argument for this Court to resolve.

CONCLUSION

We respectfully submit that the three-judge court's decision was squarely based upon this Court's decisions and should be affirmed.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi

JAMES H. HADDOCK
Chief Attorney, Mississippi
Tax Commission

ROBERT L. WRIGHT
Washington, D. C.
Special Counsel to the
Mississippi State Tax
Commission

APPENDIX

APPENDIX

76TH CONGRESS, 3D SESSION

SENATE

REPORT NO. 1625

APPLICATION OF STATE SALES, USE, AND INCOME TAXES TO TRANSACTIONS IN FEDERAL AREAS

MAY 16 (legislative day, APRIL 24), 1940—
Ordered to be printed

MR. GEORGE, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 6687]

The Committee on Finance, to whom was referred the Bill (H.R. 6687) to authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property or upon sellers, purchasers, or users of such property measured by sales, purchases, or use thereof occurring in United States national parks, military and other reservations or sites over which the United States Government may have jurisdiction, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

GENERAL STATEMENT

This bill passed the House at the first session of the Seventy-sixth Congress and was referred to the Committee on Finance which reported it to the Senate with certain clarifying changes on July 28, 1939. Due to certain objec-

tions being raised to the bill by various departments in the executive branch of the Government after the bill had been reported to the Senate, it was recommitted to the Committee on Finance for further study and recommendation. Your committee, through a subcommittee composed of Senators George, Brown, and La Follette, held a hearing on April 23, 1940, at which time representatives of the various State taxing authorities appeared in favor of the bill and representatives of the War and Navy Departments and of the Department of the Interior appeared in opposition to certain features of the bill.

Upon completion of the hearings, the subcommittee suggested that a conference be held by the representatives of the State agencies and the Federal agencies with a view to recommending to said subcommittee any proposal or proposals upon which said representatives could agree. Such a conference was held and the proposals which were submitted were used as a point of departure by the subcommittee in drafting the amendment reported by your committee.

In general, the bill, as amended, proposes to do three things. First, it provides that State sales and use taxes (with certain exceptions which are hereafter explained) shall be applicable with respect to transactions occurring within Federal areas in the same manner and to the same extent as they are applicable with respect to transactions occurring outside such areas and within the State. Second, it provides that State income taxes shall be applicable with respect to persons residing within a Federal area or receiving income from transactions occurring or services performed in such area in the same manner and to the same extent as they are applicable with respect to persons residing outside such area or receiving income from transactions occurring or services performed outside such area. Third, it contains certain clarifying amendments to section 10 of the Federal Highway Act of June 16, 1936

(known as the Hayden-Cartwright Act permitting State taxation of sales of gasoline and other motor-vehicle fuels sold in Federal areas for private purposes), and provides that the tax levied and collected under that section shall continue to be levied and collected under that section, as amended, rather than under the authority contained in section 1 of this bill.

Detailed Explanation of the Bill

Section 1(a) of the committee amendment removes the exemption from sales or use taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. At the present time exemption from such taxes is claimed on the ground that the Federal Government has exclusive jurisdiction over such areas. Such an exemption may be claimed in the following types of cases: First, where the seller's place of business is within the Federal area and a transaction occurs there, and, second, where the seller's place of business is outside the Federal area but delivery is made in Federal area and payment received there. This section will remove the right to claim an exemption because of the exclusive Federal jurisdiction over the area in both of these situations. The section will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred.

This section also contains a provision granting the State or taxing authority full jurisdiction and power to levy and collect any such sale or use tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. This additional authorization was deemed to be necessary so as to make it clear that the State or taxing authority had power to levy

or collect any such tax in any Federal area within the State by the ordinary methods employed outside such areas, such as by judgment and execution thereof against any property of the judgment-debtor.

Subsection (b) of section 1 provides that the taxes to be levied and collected under this section shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after June 30, 1940.[6]

Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction; but his less fortunate colleague, who is also ordered there for duty and rents a house outside the academy grounds because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption,

[6] The Bill was not passed until October 9, 1940 and the effective date was changed accordingly to December 31, 1940, 54 Stat. 1060.

is that under the doctrine laid down in *James V. Dravo Contracting Co.* (302 U.S. 134, 1937), a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction.

This section contains, for the same reasons, a similar provision to the one contained in section 1 granting the State or taxing authority full jurisdiction and power to levy and collect any such income tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Subsection (b) of section 2 provides that the taxes to be levied and collected under this section shall be applicable only with respect to income or receipts received after June 30, 1940. Your committee, upon recommendation of the representatives of the State taxing authorities, has made the effective dates of both section 1 and section 2 the same for ease in administration and to prevent the income tax section from becoming effective retroactively. The definition of income tax is broad enough to include a sales tax which is measured by gross receipts from sales. To fix an earlier effective date for the income tax section than for the sales tax section would thus result in having different effective dates for the same tax, in some cases, and would also permit the retroactive application of such sales taxes.

Section 3 of the committee amendment provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. This section also provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax with respect to sale, purchase,

storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. An authorized purchaser being a person who is permitted, under regulations of the Secretary of War or Navy, to make purchases from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, such as post exchanges, but such person is deemed to be an authorized purchaser only with respect to such purchases and is not deemed to be an authorized purchaser within the meaning of this section when he makes purchases from organizations other than those heretofore mentioned.

For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment.

Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal areas over which the United States exercised exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas. The provisions of this section are applicable to all Federal areas over which the United States exercise jurisdiction, including such areas as may be acquired after the date of enactment of this act.

Section 5 of the committee amendment provides that section 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

Section 6 contains the definitions of the terms used in the committee amendment.

Subsection (a) defines the term "person" as it is defined in section 3797 of the Internal Revenue Code to mean and include an individual, trust, estate, partnership, company, or corporation.

Subsection (b) defines the term "sales or use tax" but excepts from such definition a tax with respect to which the provisions of section 10 of the Federal Highway Act of June 16, 1936, are applicable. Section 10 of that act, commonly known as the Hayden-Cartwright Act, permits State taxation of sales of gasoline and other motor-vehicle fuels sold in Federal areas for private purposes. Your committee thought it desirable that the provisions of that act should be continued in effect without regard to the provisions of section 1 of the committee amendment and therefore any State tax which is imposed on sales of gasoline and other motor-vehicle fuels will continue to be imposed on such sales in Federal areas under the provisions of section 10 of that act, as amended by section 7 of the committee amendment, rather than under the provisions of section 1 of the committee amendment.

Subsection (c) defines the term "income tax" to mean any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. This definition, as well as the preceding definition of sales or use tax must of necessity cover a broad field because of the great varia-

tions to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or by any other name) if it is levied on, with respect to, or measured by, net income, gross income, or gross receipts.

Subsection (d) defines the term "State" to include any Territory or possession of the United States. The District of Columbia was not included in the definition since Congress is the local legislature for the District and any Sales, use or income taxes enacted for the District are applicable in all areas within said District.

Subsection (e) defines the term "Federal area" to mean any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States. Any Federal area, or any part thereof, which is located within the exterior boundaries of any State is deemed to be a Federal area within such State for the purposes of this act. For example, Yellowstone National Park is a Federal area which is located wtihin the exterior boundaries of three States (Wyoming, Montana, and Idaho) and therefore, for the purposes of this act, that part of the Park which falls within the exterior boundaries of Wyoming will be included within Wyoming's taxing jurisdiction, that part which falls within Montana will be included within Montana's taxing jurisdiction, and that part which falls within Idaho will be included within Idaho's taxing jurisdiction.

Section 7(a) of the committee amendment amends section 10 of the Hayden-Cartwright Act so that the authority granted to the States by such section 10 will more nearly conform to the authority granted to them under section 1 of this act. At the present time a State such as Illinois, which has a so-called gallonage tax on gasoline based upon the

privilege of using the highways in that State, is prevented from levying such tax under the Hayden-Cartwright Act because it is not a tax upon the "sale" of gasoline. The amendments recommended by your committee will correct this obvious inequity and will permit the levying of any such tax which is levied "upon with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels."

Subsection (b) of section 7 is a clarifying amendment to such section 10 restating what was the obvious intent of the original act.

Your committee has also amended the title of the bill to conform to the changes made in the text.

Supreme Court, U. S.
FILED
APR 18 1975
MICHAEL RODAK, JR., CLERK

No. 74-548

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

STUART A. SMITH,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

---

1. In seeking to sustain the Mississippi tax imposed upon federal military purchasing facilities as a result of their purchase of alcoholic beverages from out-of-state distillers, appellees (Br. 5-6) place principal reliance upon *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. There, the Court held that a concessionaire which operated hotels, camps, and stores in Yosemite National Park, under a contract with the Secretary of the Interior, was subject to a California ex-

cise tax on the sale of beer, wine, and distilled spirits. Appellees state (Br. 6) that "[u]nless the Court is now prepared to overrule this aspect of the Yosemite decision, the decision below must be affirmed."

Collins v. *Yosemite Park Co.* does not mandate approval of the Mississippi levy at issue here. Unlike the military purchasing facilities involved in this case, the concessionaire operating in Yosemite National Park was not a federal instrumentality. There, the concessionaire was not incorporated into the government structure nor was it operated as an arm of the government for the performance of essential governmental functions. Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485; *United States* v. *Township of Muskegon*, 355 U.S. 484, 486; *United States* v. *Boyd*, 378 U.S. 39, 48; *Department of Employment* v. *United States*, 385 U.S. 355, 358-360. To the contrary, it was a private California corporation which conducted its business in Yosemite National Park pursuant to a contract with the Secretary of the Interior (see 304 U.S. at 521).[1] Such a con-

[1] Contrary to appellees' argument (Br. 11), the Court in *Collins* did not decide that the private concessionaire was a federal instrumentality. The district court in that case concluded that it was immaterial whether the concessionaire was a federal instrumentality (see 20 F. Supp. 1009, 1014 N.D. Cal.)) and that point was never raised by any of the parties before this Court. Indeed, the Court's description of *Collins* in its first opinion in this case (412 U.S. 363, 375) as turning upon the reservation of the state's taxing power is confirmed by the briefs filed in that case which focused entirely upon the scope of the reservation of state taxing power incident to the cession of the park. See *Rainier Nat. Park Co.* v. *Martin*, 18 F. Supp. 471, 486 (W.D. Wash.), affirmed *per curiam*, 302 U.S. 661, where the district court assumed without deciding that a similar concessionaire was a federal instrumentality. But compare *Rainier Nat. Park Co.* v. *Henneford*, 182 Wash. 159, 162-163, 45 P. 2d 617, 618 (Sup. Ct.), certiorari denied, 296 U.S. 647, which held that such concessionaires were not federal instrumentalities. See also S.S.T. 31, XV-2 Cum. Bull. 400, which holds that service performed in the employ of operators of concessions of national parks does not constitute service performed in the employ of an instrumentality of the United States within the meaning of the Social Security Act.

tractor has none of the attributes of a governmental instrumentality and would not have been shielded from the imposition of a state sales tax by the doctrine of immunity applicable to federal instrumentalities.[2]

At all events, assuming *arguendo* that the concessionaire in *Collins* was considered to be a federal instrumentality, the reservation of the state taxing power in Yosemite National Park distinguishes it from this case. There, the applicable reservation of state taxing power was broadly cast to include "the right to tax persons and corporations, their franchises and property on the lands included in said parks * * *." See 16 U.S.C. 57, as quoted in *Collins*, *supra*, 304 U.S. at 526, n. 10. See also *Rainier Nat. Park Co.* v. *Martin*, 18 F. Supp. 481 W.D. Wash.),

[2] *Howard* v. *Commissioners*, 344 U.S. 624, cited by appellees (Br. 7), has no application to the question presented. That case involved state taxation of the income of employees of a federal ordinance plant located within a federal enclave. These employees were not federal instrumentalities and, pursuant to the consent of the Buck Act, the fact that the tax was levied within a federal enclave was no bar to its imposition.

affirmed *per curiam*, 302 U.S. 661. While that general reservation of state taxing power in Yosemite National Park might have arguably included federal instrumentalities, it cannot be analogized to the narrowly drawn congressional consent in the Buck Act which is applicable here.

Although the Buck Act provides that no person shall be relieved of the payment of any state sales tax "on the ground that the sale * * * occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)), it further provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof" (4 U.S.C. 107(a)). In the face of this presently applicable statutory exception designed to protect federal instrumentalities, the scope of the Buck Act is not equivalent to the prior reservation of state taxing power involved in *Collins*.[3] As the Court expressly noted in its prior decision in this case, "this aspect of the [*Collins*] decision was bottomed specifically on the State's reservation of taxing

[3] Appellees erroneously state (Br. 7) that "[i]f * * * a state tax is laid on a federal instrumentality, the Buck Act exemption applies alike to exclusive and concurrent jurisdiction enclaves." The Buck Act merely permits the state to levy certain taxes within federal areas just as if they were within the state jurisdiction. But the exception in 4 U.S.C. 107(a) for federal instrumentalities flatly contradicts appellees' assertion that the Buck Act provides a generalized congressional consent to state taxation of federal instrumentalities. A plain reading of the Buck Act requires precisely the opposite conclusion.

authority in its cession of lands to the United States" (412 U.S. at 375).

Hence, the critical question in this case, which was not considered in *Collins*, is whether the legal incidence of the state tax falls upon the military purchasing facilities which the district court correctly found to be federal instrumentalities (J.S. App. 9a). If, as we have argued at pp. 17-23 of our opening brief, the legal incidence of the Mississippi tax is on the military purchasing facilities, it cannot be imposed unless Congress has given its consent. As the Court stated in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122, "[t]he doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."

2. Contrary to appellees' further argument (Br. 20), *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, controls this case despite the fact that the Court did not reach the constitutional question whether national banks were immune from state taxation as federal instrumentalities. The significance of that decision for purposes of this case is not the particularized tax immunity it accords national banks. Rather, it is the Court's conclusion there (392 U.S. at 346-348) that the legal incidence of the Massachusetts sales tax was upon the national bank because the state statute required that the tax be passed on to the purchasers. The provisions in Mississippi's Regulation 25 requiring that direct orders

from military purchasing facilities to out-of-state distillers "shall bear the usual wholesale markup" and that the distiller shall "remit the wholesale markup" to the State are in all pertinent respects equivalent to the Massachusetts tax. Thus, the determination of the Mississippi legislature and its taxing authorities that the tax be passed on to the military requires the conclusion that the legal incidence of the tax is upon the federal instrumentalities.[4] In light of the constitutional prohibition against such a state levy, the Mississippi tax cannot stand.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

STUART A. SMITH,
Assistant to the Solicitor General.

APRIL 1975.

---

[4] *Polar Co.* v. *Andrews*, 375 U.S. 361, relied upon by appellees (Br. 7-8), is distinguishable. There, the Court found that the legal incidence of the Florida tax was upon the seller's activity of processing or bottling milk. Unlike this case, the statute did not require that the tax be passed on to the federal purchaser (see 375 U.S. at 382-383).

Appellees' reliance (Br. 11) upon *National Distillers* v. *State Board*, 33 Cal. App. 2d 35, 187 P.2d 821 (D. Ct. App.), is similarly misplaced. In that case, the court upheld a tax upon the sale of alcoholic beverages to the United States on the ground that the legal incidence of the tax was on the seller. Moreover, passage of title to the goods in that case took place within the jurisdictional limits of California.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 573501 143

Supreme Court, U. S.
FILED
APR 7 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-548

UNITED STATES OF AMERICA,
Appellant,

v.

STATE TAX COMMISSIONER OF THE STATE OF MISSISSIPPI, ET AL.,
Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General of Virginia
Supreme Court–State Library Building
Richmond, Virginia 23219

WILLIAM P. BAGWELL, JR.
Assistant Attorney General of Virginia
Post Office Box 27491
Richmond, Virginia 23261

TABLE OF CONTENTS

Page

STATEMENT 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. Earlier Cases Indicate The Special Nature Of The Traffic In Intoxicants And Some Of The Control Problems. 4

II. The Scope Of The Police Power Of The States Is Indicated By Decisions Resolving Many Previous Conflicting Constitutional Claims. 6

III. The Rights Of The Military Are Not Superior To The Police Powers With Respect To Intoxicants. 13

CONCLUSION 18

APPENDIX

TABLE OF CITATIONS

Cases

California v. LaRue, 409 U.S. 109 (1972) 17

Carter v. Commonwealth of Virginia, 321 U.S. 131 (1944) 10, 11, 12

Crane v. Campbell, 245 U.S. 304 (1917) 5, 17

Crowley v. Christensen, 137 U.S. 86 (1890) 4, 17

Duckworth v. Arkansas, 314 U.S. 390 (1941) 12, 14

Gordon v. State of Texas, 355 U.S. 369, 310 S.W.2d 328 12

Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1939) 16

Page

Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944) 15

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) 11, 14, 16

Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) 16

McCormick & Co. v. Brown, 286 U.S. 131 (1932) 6, 17

Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) 16

State Board of Equalization of California v. Young's Market Co., 299 U.S. 59 (1936) 8, 13, 14

Ziffrin v. Reeves, 308 U.S. 132 (1939) 9, 14

Constitution, Statutes and Regulations

Assimilative Crimes Act, 18 U.S.C. § 13 17

Buck Act, 61 Stat. 644-645, 4 U.S.C. 105-111 16

Federal Motor Carrier Act, Act of August 9, 1935, ch. 498, 49 Stat. 543 9

National Prohibition Acts, Act of October 28, 1919, ch. 85, 41 Stat. 305, and Act of November 23, 1921, ch. 134, 42 Stat. 222 7

United States Constitution:

Article I, Section 8 .....3, 4

Article VI 4, 16

Tenth Amendment 7

Eighteenth Amendment 7

Twenty-first Amendment 11

Webb-Kenyon Act, Act of March 1, 1913, ch. 90, 37 Stat. 699, (now 27 U.S.C. § 122 as amended) 7, 11, 17

Mississippi Code, 1972:

§ 27-71-11 .....2, 15

§ 67-1-41 .....2, 10, 15

Code of Virginia (1950):

Title 4 2

Page

§ 4-15(b) 3

§ 4-28 3

§ 4-53 2

Mississippi State Tax Commission, Regulation 25 7

In The

Supreme Court of the United States

October Term, 1974

No. 74-548

UNITED STATES OF AMERICA,

Appellant,

v.

STATE TAX COMMISSIONER OF THE STATE OF MISSISSIPPI, ET AL.,

Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

STATEMENT

This brief, sponsored by the Attorney General of Virginia, is filed pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

Virginia, like Mississippi, has adopted a comprehensive plan permitting a limited traffic in intoxicating liquors under strict controls. In Mississippi the State Tax Commission has been designated as the sole wholesale distributor, with the sole right to import and to sell at wholesale, including, at the discretion of the Commission, the right to

sell to "any retail distributors operating within any military post or qualified resort areas within the boundaries of the State . . ." Miss. Code 1972, § 67-1-41. The Commission elected to sell to the military and opened two channels of supply—military orders could be placed with the Commission, or directly with nonresident distillers, the orders in either case to include the State's markup, but to be exempt from all other State taxes. Regulation 25 of the Mississippi State Tax Commission. The Commission was directed to fix the amount of the various markups ". . . as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states." Miss. Code 1972, § 27-71-11. As to orders placed directly with distillers, the lower court found that the distillers were directed to prepay the markup to the Commission at the time of shipment to the military customer. *United States* v. *State Tax Commission of Mississippi*, 378 F.Supp. 558, 567 (1974).

As an integral part of the control plan, and perhaps the foundation upon which the entire plan rested, all traffic in intoxicating liquors was declared to be illegal except as authorized under the act, and liquor removed from the permitted channels was declared to be contraband. Miss. Code 1972, §§ 67-1-9, 67-1-17, 67-1-41, 67-1-45, 67-1-87.

Virginia is also a "monopoly" state and its control plan, found in Title 4 of the Code of Virginia (1950), as amended, bears many similarities to Mississippi's plan, including a provision that ". . . all alcoholic beverages . . . which are kept, stored, possessed, or in any manner used in violation of the provisions of this chapter . . . shall be deemed contraband . . ." Code of Virginia (1950), as amended, § 4-53. The Virginia Alcoholic Beverage Control Board operates government retail stores (*id.* § 4-28), and is authorized to sell alcoholic beverages to federal enclaves over which the United States has acquired jurisdiction at ". . . such discount prices as the Board may determine." *Id.* § 4-15(b). This Board has in fact made various proposals to the military which would enable the Government to purchase alcoholic beverages on a negotiated basis.[1] Such proposals have been completely ignored by the Government. Instead the Government insists on bypassing Virginia as a possible source from which to obtain alcoholic beverages and buys directly from the distiller. If the decision of the lower court is sustained, as Virginia contends it should be, Virginia will be assured of her right to alleviate any strain upon her control system, if she be so advised.

SUMMARY OF ARGUMENT

The proper approach to the problem presented by intoxicating liquor has been perplexing for centuries, and solutions satisfactory to all probably will never be found. Virginia believes that local, rather than national, control as has been developed over the years, is the proper and existing constitutional policy.

The Government presents arguments in the instant case based on Article I, Section 8, and Article VI of the Constitution (Brief for Appellant at 33-42), and also upon federal immunity from state taxation. *Id.* at 14. It reminds the Court that when a State's power to regulate alcoholic beverages collides with conflicting interests under the Constitution, " 'each must be considered in the light of the other.' " *Id.* at 25.

---

[1] Appendix this brief at 1-5 which is a proposal made to representatives of armed services and Department of Defense in July, 1974.

In considering conflicts between the police power of the state with claims originating under the Constitution of the United States, the nature of the subject matter is important. Early decisions have designated intoxicating liquor as a source of danger to the community, as an article that may be declared to be contraband and not a proper article of commerce. Intoxicating liquor has been denominated as a fit subject for the exercise of the police power. Experience with different theories through the years establishes that local control offers better prospects for success than national control.

An examination of many of the cases, particularly those involving the Commerce Clause, marks out the boundaries of the police power of the states, and requires a decision that Mississippi's control plan is based on sound precedents, and survives the constitutional attack made on behalf of the Government. Virginia believes that it is yet true that a state has the power to bar absolutely any traffic in intoxicants, or to admit a limited traffic—whether interstate commerce is involved, whether the traffic is destined for a military reservation subject to exclusive federal jurisdiction, and whether the conflicting claims flow from Art. I, Section 8, or Art. VI of the Constitution, or from a claim of federal immunity from taxation.

ARGUMENT

I.

Earlier Cases Indicate The Special Nature Of The Traffic In Intoxicants And Some Of The Control Problems.

The special nature of the traffic in intoxicating liquors was long ago indicated in *Crowley* v. *Christensen,* 137 U.S.

86 (1890), a case in which San Francisco refused to issue a new retail liquor license under a city ordinance. The Court made these statements:

> "It is a question of public expedience and public morality, *and not of federal law.* The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. *As it is a business attended with danger to the community,* it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. *The manner and extent of regulation rest in the discretion of the governing authority . . . . It is a matter of legislative will only.*" 137 U.S. at 91. Emphasis added.

In *Crane* v. *Campbell,* 245 U.S. 304 (1917) the Court indicated that a person has no right, that a state may not abridge, to possess intoxicating liquor for his personal use, or to transport it within a state, reiterating that:

> "It must now be regarded as settled that on account of their *well-known noxious qualities and extraordinary evils . . . a state has power absolutely to prohibit* manufacture, gift, purchase, sale or *transportation of intoxicating liquors within its borders* without violating the guarantees of the Fourteenth Amendment . . . ." 245 U.S. at 307. Emphasis added.
>
> * * *
>
> "We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States, which no state may abridge. *A Contrary view would be incompatible with the undoubted*

> *power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state.*" 245 U.S. at 308. Emphasis added.

It is also clear that transportation over Mississippi's territory is the only feasible way of getting liquor into federal enclaves within Mississippi's boundaries. Can Mississippi make it illegal to possess or transport liquor within her boundaries—or can she legalize possession upon conditions? Does the military have any rights superior to Mississippi's in either event?

II

The Scope Of The Police Power Of The States Is Indicated By Decisions Resolving Many Previous Conflicting Constitutional Claims.

Over many years, this Court's interpretations of state laws with respect to intoxicating liquors have indicated that the Commerce Clause has little, if any, inhibiting effect. This Clause has been selected because it is relevant to this case, and because the Court has examined so many constitutional arguments predicated on this clause.

In 1932 West Virginia law prohibited the manufacture and keeping of intoxicants, with certain exceptions. One of the exceptions permitted a nonresident manufacturer to obtain a $50 permit as a "wholesale dealer," sales being deemed to be consummated in the county of delivery. In *McCormick & Co.* v. *Brown,* 286 U.S. 131 (1932), complainants had obtained federal permits for their products under the National Prohibition Acts,[2] and contended that

[2] Act of Oct. 28, 1919, ch. 85, 41 Stat. 305 and Act of Nov. 23, 1921, ch. 134, 42 Stat. 222.

they were not intoxicating liquors within the meaning of the Webb-Kenyon Act.[3] They further contended that the character of their products must be construed under the National Prohibition Act and that West Virginia could not declare that to be illegal for which a federal permit had been issued—particularly since the products were being sold in interstate commerce. The Court denied these contentions, and noted that there was no basis for objection because of "arbitrariness in the state's requirements" (286 U.S. at 139); that the purpose of the Webb-Kenyon Act was to prevent the "immunity characteristic of interstate commerce from being used" (286 U.S. at 140); that the Eighteenth Amendment and the National Prohibition Act did not supersede state prohibition acts which did not sanction what the constitutional amendment prohibits; and, finally, that state laws derived their force, not from the Eighteenth Amendment, but from the powers reserved by the states under the Tenth Amendment (286 U.S. at 141). As to the argument that there was no intent to violate West Virginia laws, the Court said:

> ". . . [T]he shipments of their products into the state for the purpose of consummating their sales without the described permits would fall directly within the terms of that act." 286 U.S. at 143.

In other words, the Court was saying that a departure from permitted channels would have stigmatized the shipment as illegal the moment it entered West Virginia territory—notwithstanding the Commerce Clause *or federal permits evidencing legality of the products.*

If Mississippi declared it illegal to possess liquor under any circumstances within the State, would a shipment of

[3] Act of March 1, 1913, ch. 90, 37 Stat. 699. The Webb-Kenyon Act, as amended, is still in effect (27 U.S.C. § 122).

liquor destined for a federal enclave in Mississippi be contraband under Mississippi law, or lawful under regulations issued by the Department of Defense as it entered the state? Would such a law be construed to be inoperative as to a shipment not intended for delivery or use in Mississippi?

In *State Board of Equalization of California* v. *Young's Market Co.*, 299 U.S. 59 (1936) this Court said:

> *"Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?*
>
> * * *
>
> "Moreover, in the light of history, we cannot say that the exaction of a *high license fee for importation* may not, like the imposition of the high license fees exacted for the privilege of selling at retail, *serve as an aid in policing the liquor traffic.*" 299 U.S. at 63. Emphasis added.

Young's Market indicates the propriety of a state monopoly. Mississippi's monopoly is predicated on her ability to act as the sole wholesaler, and the operation probably would not be financially feasible without the collection of a markup. The State Tax Commission was specifically directed to "cover the cost of operation." Instead of prohibiting liquor from going into federal enclaves entirely, cannot Mississippi permit it upon condition that the traffic bear a proportionate expense for using the transportation facilities and governmental services required? Can this Court say now, as it could not say in *Young's Market*, that the markup does not serve as an aid in policing traffic or that it is not an integral part of the comprehensive control plan of Mississippi?

The case of *Ziffrin* v. *Reeves*, 308 U.S. 132 (1939), indicates that many of the same principles obtain since the passage of the Twenty-first Amendment. Kentucky's control plan was examined with reference to its application to an Indiana contract carrier claiming the right to transport liquor from Kentucky to Chicago under the Federal Motor Carrier Act.[4] The Court noted that every phase of the liquor traffic was declared illegal unless definitely allowed, with the property becoming contraband upon failure to observe the numerous statutory requirements. Among these requirements was a tranporter's license, and upon denial of his application therefor appellant attacked the constitutionality of Kentucky's control laws.

This Court made the following statements:

> "The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; *also to facilitate the collection of revenue.*" 308 U.S. at 134. Emphasis added.
>
> * * *
>
> "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. *The greater power includes the less.*" 308 U.S. at 138. Emphasis added.
>
> * * *
>
> "Kentucky has seen fit to permit manufacture of whiskey only upon condition *that it be sold to an indicated class of customers* and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-

[4] Act of August 9, 1935, ch. 498, 49 Stat. 543.

known evils, *and secure payment of revenue.* The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; *and property so circumstanced cannot be regarded as a proper article of commerce.*" 308 U.S. at 139. Emphasis added.

Has not Mississippi declared intoxicating liquor not to be a "proper article of commerce" unless the conditions are observed? Has not Mississippi defined an "indicated class of customers," to-wit, ". . . retail distributors operating within any military post . . . within the boundaries of the State . . ."? Miss. Code 1972, § 67-1-41.

Not only does the police power operate unfettered by the Commerce Clause upon out of state shipments destined for delivery within a state, but also it is validly operative upon interstate traffic through a state. Thus in *Carter* v. *Commonwealth of Virginia,* 321 U.S. 131 (1944), Virginia required, among other things, that an interstate shipment of liquor be confined to the most direct route, *that there be a lawful consignee,* that a permit be obtained, and that a penal bond conditioned upon lawful transportation be posted. A shipment of liquor from Maryland through Virginia into North Carolina was involved. This Court said:

> "The Act in question contains a comprehensive scheme for the control of trade in alcoholic beverages within the territory of Virginia."
>
> "It will be observed that the intoxicating liquors in question are intended for continuous shipment through Virginia, so that here, as in the *Duckworth* case a different question arises from those considered under the Twenty-first Amendment, where transportation or importation into a state for delivery or use therein was prohibited." 321 U.S. at 135.

* * *

> ". . . Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the Commerce Clause alone . . . . *By interpretation of this Court the amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over such transportation or importation.*" 321 U.S. at 137. Emphasis added.

The interpretation seems uniformly to have been that the police power of a state with reference to a "business attended with danger to the community" is not diminished by the powers delegated to the United States—at least in the light of the Webb-Kenyon Act and the Twenty-first Amendment the interpretations have uniformly upheld the police power of a state with reference to the Commerce Clause. Thus, in his concurring opinion in *Carter* Mr. Justice Black said:

> "The Twenty-first Amendment has placed liquor in *a category different* from that of other articles of commerce. Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, *this much is settled; local, not national, regulation of the liquor traffic is now the general constitutional policy.*" 321 U.S. at 138. Emphasis added.

In his concurring opinion in *Carter* Mr. Justice Frankfurter noted that persons could not resort to Commerce Clause arguments to frustrate the right of a state to prohibit the traffic in liquor, nor would this Court take on the "impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of the liquor traffic." 321 U.S. at 142. *Cf. Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 46-47 (1966).

In *Gordon* v. *State of Texas*, 355 U.S. 369 (1958), the opinion of the Texas Court[5] was affirmed in a *per curiam* opinion citing the *Carter* case. Gordon was traveling from Mexico via Texas to North Carolina with eleven bottles (one-fifth gallon each) of rum in his possession. Texas law imposed a tax *for the privilege of possessing liquor in the state*. Additionally it was unlawful to import more than one quart into Texas without a permit. Gordon's conviction for unlawful possession was affirmed, the lower court saying:

> "*Unless and until that tax was paid*, the rum was an illicit beverage, and contraband subject to be seized as such.
>
> This being true, the rum could not come under interstate commerce regulation. *As it was contraband, the right to possess and to transport it did not exist.*" 310 S.W. 2d at 330. Emphasis added.

Do the constitutional claims advanced by the Government embrace a right to possess and transport contraband through a state?

The case of *Duckworth* v. *Arkansas*, 314 U.S. 390 (1941) held that Arkansas had a right to require a permit from a truck transporting liquor in interstate commerce from Illinois to Mississippi, the Court saying:

> "A state may police 'caravans' of motor vehicles moving over its highways in interstate commerce *and charge a compensatory license fee* for doing it [Citing authority] It may in the interest of public safety and convenience, *restrict particular types of motor vehicles moving in interstate commerce to particular areas.*" 314 U.S. at 395. Emphasis added.

---

[5] Reported at 310 S.W. 2d 328

Has not Mississippi, in effect, singled out an indicated class of customers and said that, as to this class, the mark-up is a tax on the privilege of possessing liquor in Mississippi?

III.

The Rights Of The Military Are Not Superior To The Police Power With Respect To Intoxicants.

Appellant argues that the markups imposed by the Mississippi regulation "are not designed to protect the health, welfare or morals of its citizens, but rather to raise revenue by taxing liquor sales to military facilities." Brief for Appellant at 27. On the same page, appellant refers to Congressional debates concerning the Twenty-first Amendment, pointing out a remark that the Amendment would be of financial advantage to the federal government, which could eliminate the "expense of enforcing prohibition while at the same time raising tax revenues on liquor." Is that part of a control plan designed to defray necessary governmental expenses incident thereto separable and unrelated to the exercise of the police power that makes the plan possible?

The Government's argument seems similar to that advanced in *Young's Market*, where plaintiffs argued that California's requirement of a license tax for the privilege of importing beer was unconstitutional. This Court rejected that contention, and said:

> "The plaintiffs argue that, despite the Amendment, a state may not regulate importations *except for the purpose of protecting the public health, safety or morals;* and that the importer's license fee was not designed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition." 299 U.S. at 63. Emphasis added.

The Court proceeded to hold that it could not say that a high license fee for importation did not, like a license fee for selling at retail, serve as an aid in policing the liquor traffic, a statement previously quoted herein at p. 8.

In sustaining New York's "price warranty" law, as against Due Process and Equal Protection arguments, this Court, in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 46-47 (1966) stated:

> "Moreover, nothing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance. The announced purpose of the legislature was to eliminate 'discrimination against and disadvantage of consumers' in the State."

The "collection of revenue" was not a reprehensible nor proscribed part of Kentucky's control plan devised under the police power, as noted in *Ziffrin,* 308 U.S. at 134; nor was anything iniquitous found in Arkansas' "compensatory license fee" in *Duckworth,* 314 U.S. at 395. These are legitimate state interests.

Young's Market and *Ziffrin* stand for the proposition that a state can permit domestic manufacture of alcoholic beverages and exclude all other—or permit such other subject to conditions, such as an importation fee. *Gordon,* for example, stands for the proposition that a tax may be imposed on the privilege of possession—though the liquor is in interstate commerce and destined for another state. *Carter* stands for the proposition that interstate traffic through a state may be channelized and that a condition requiring a lawful consignee in the state of destination is not a law of extraterritorial effect but a law of the state imposing the condition.

Mississippi's law is not dependent upon extraterritorial effect. Mississippi's markup, and the associated control devices, are integral parts of a comprehensive plan designed to make Mississippi the only wholesaler "within the boundaries of the state," (Miss. Code 1972, § 67-1-41) therein channelizing the traffic. The entire plan was also designed, among other things, to "cover the cost of operation of the State wholesale liquor business." *Id.* § 27-71-11.

Mississippi's law singles out and describes a particular traffic—"retail distributors operating within any military post" (*Id.* § 67-1-41), whether wthin an enclave subject to exclusive or concurrent jurisdiction. Such retailers are given a choice of buying from the distillers or direct from the State Tax Commission. It was declared "unlawful for any person to . . . possess . . . transport . . . any alcoholic beverage except as authorized in this chapter." *Id.* § 67-1-9. Another statute also declares that "[i]t shall be unlawful for any person to have or possess either alcoholic beverages or personal property intended for use in violating the provisions of this chapter . . . No property rights shall exist in any such personal property or alcoholic beverages." *Id.* § 67-1-17. Under Mississippi law a shipment destined for a federal enclave, in a case where the markup had not been paid, would constitute an unlawful diversion from lawful channels at the time it entered the state, the tax operating upon the right to possess as it did in *Gordon.* The law has been designed to protect Mississippi's monopoly by plugging up holes through which liquor might come into the State, using Mississippi's transportation facilities and enjoying the use and protection of all governmental services required in policing the traffic, without contributing to the cost. The Court indicated in *Johnson* v. *Yellow Cab Transit Co.,* 321 U.S. 383, 386 (1944) that had Oklahoma's law been designed to "protect itself from illegal liquor diversions within

the area which Oklahoma has power to govern, the interpretation asked for might well be an acceptable one." Fort Sill was subject to the exclusive jurisdiction of the United States, and the shipment involved was destined for army personnel there. *Carter* and *Duckworth* were cited by the court in support of the above conclusion. Mississippi's law, it is submitted, is designed to prevent illegal diversion.

While this brief has emphasized decisions involving conflicts between the police power and Commerce Clause claims, it might be noted that Due Process and Equal Protection arguments have previously been rejected. *E.g., Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm.*, 305 U.S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). It is submitted that arguments respecting rights flowing from Art. I, § 8, cl. 17 of the Constitution, federal immunity from taxation, and federal supremacy under Art. VI of the Constitution should fare no better—all are based on parts of the same Constitution. The language of the Twenty-first Amendment bars the assertion of any such claims against the laws of the state, and the fact that some of the traffic is destined for federal enclaves subject to exclusive jurisdiction should be immaterial—Mississippi's law is not dependent upon extraterritorial effect, and, aside from the Buck Act, 61 Stat. 644-645, 4 U.S.C. 105-111, has no such effect.

As to the government's claim that Mississippi's law interferes with procurement policies, the argument seems to be based on the premise that there has been a radical change in the nature of intoxicating liquors—they are no longer "dangerous to the community," and have lost "well-known noxious qualities and extraordinary evils" as described in

Crowley and *Crane*, and are now impliedly necessary to the "morale and efficiency of the armed forces." Brief for Appellant at 28. One reading the account of the conditions existing in a sister state, as depicted by this Court in *California* v. *LaRue*, 409 U.S. 109 (1972), might well doubt that there has been any significant change in either human nature or in the intrinsic characteristics of intoxicating liquor. The argument ignores the fact that the Twenty-first Amendment was made a part of the same Constitution from which the claimed powers must stem—and at a later date. The argument ignores the consistent interpretations of this Court through the years, and the consistent position of Congress as indicated by the Webb-Kenyon Act, 27 U.S.C. § 122, and the Assimilative Crimes Act, 18 U.S.C. § 13. It ignores the fact that the sovereign states delegated powers to a federal government—that the states derive no power from the Constitution. The Twenty-first Amendment makes it clear, however, as this Court has consistently held, that the police power of the states ought not to be frustrated by constitutional claims in the field of intoxicating liquors. The following statement made by this Court in *LaRue*, 409 U.S. at 114, has considerable relevancy to this case:

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." Cf. *McCormick & Co.* v. *Brown, supra*, 286 U.S. at 141.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Amicus Curiae
By Counsel

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General of Virginia
Supreme Court–State Library Building
Richmond, Virginia 23219

WILLIAM P. BAGWELL, JR.
Assistant Attorney General of Virginia
Post Office Box 27491
Richmond, Virginia 23261

APPENDIX

PROPOSAL FOR THE VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL TO SUPPLY MERCHANDISE FOR RESALE TO MILITARY INSTALLATIONS

I.

Background Of Virginia Alcoholic Beverage Control

The Virginia Alcoholic Beverage Control Board was established in 1934 with the purpose of controlling the possession, sale, transportation and delivery of alcoholic beverages within the Commonwealth of Virginia. Over the last forty years, the system has grown to the point where there are now 250 retail outlets dispersing throughout the State with sales approaching $200 million a year. The Department owns and operates a central warehouse in Richmond, from which a private contract carrier distributes merchandise to the retail outlets on a weekly basis. Over the last several years, the Department has developd a keen awareness of the need for proper management controls. Substantial progrss has been made in providing extended service to the citizens of Virginia, while minimizing increases in operating expenses. The Department has acquired over the last forty years, both on a statewide and a national level, a reputation of functioning in an open and frank manner—free of corruption or graft that is sometimes inherent in this type of operation.

II.

Preliminary Proposal

The Virginia Department of Alcoholic Beverage Control will supply distilled spirits for resale on military reservations under the following conditions:

1) The package stores involved will receive weekly or

semi-monthly shipments via the private carrier contracted by the Department;

2) the military installations will be allowed to purchase goods at a discount price (no State tax and at a less than standard markup figure).

3) the military installations will have access to the forecasting and inventory control techniques recently developed by the Department;

4) the Department will primarily supply those brands and sizes now stocked by the Department. Under some circumstances if the demand is sufficient, the Department will stock special military brands;

5) the military installation will be billed for each shipment and payment must be within 15 days.

III.

Services Which Could Be Provided To Military Installations

A. Inventory Control

The Department has recently developed an elaborate inventory management system. This system is designed to direct management in the proper procurement and management of inventory levels and to forecast needs for the entire system, as well as on an individual retail outlet level. The system requires minimal input on the part of the retail outlets. The "IMAC" system assures a minimum dollar investment in inventory while providing a highly acceptable service level to customers.

B. Efficient Ordering and Delivery Services.

The delivery of merchandise to retail outlets is now handled by a private contract carrier on a weekly, and in some cases, twice a month basis. This delivery method has been proven to be highly reliable and only in extreme weather conditions has there been any significant deviation from the planned schedule.

C. Availability of Brands

Since the Department has such a large investment in inventory, it can afford to pre-buy items if there is some anticipated problem evolving. Strikes, material shortages, and major price increases can be anticipated and their negative effect diminished. Also the awareness of new products on the market, is very keen due to our constant contact with distiller representatives. Large purchasers, such as the Department, are often given priority to new or limited products.

D. Variety of Products Offered

The Department presently stocks 800 different codes—which translates into 304 different brands of distilled spirits and 173 different brands of foreign and domestic wine. The Department makes a periodic review of the brands and sizes carried on its inventory list and makes adjustments whenever necessary. The Department could expand its present offerings of brands of military special items if sufficient demand exists. The Department keeps constantly abreast of the introduction of new products and the change in purchasing habits as reported by a variety of industry publications and through trade organizations in the industry.

E. Profitability

Individual military installations pay more for the same product than does the Virginia Department of Alcoholic Beverage Control. This is understandable since the Department purchases in large quantities, taking advantage of discounts and benefits from lower transportation costs. Secondly, the Department does not allow a distiller to change his wholesale prices more frequently than four times a year. The Department will attempt to provide merchandise at a reasonable price, minimizing the negative impact on an installation's present margin of profit.

F. Sound Procurement

An intangible benefit would be realized by placing a volatile function outside of the handling of any one small group of people. The Commonwealth of Virginia has established a highly satisfactory and reputable record in the area of procurement. In the forty years of its existence, there has been no hint of graft, favoritism, or corruption in the procurement and management of inventory.

G. Quality Control

In order to ensure that consumers are getting a quality, unadulterated product, the Department periodically has chemical analyses performed on existing brands. All new products before their introduction to the market, must be qualitatively tested to ensure the protection of its consumers. Over the years, there have been a significant number of incidences where adulterated products have been detected before they were distributed for sale.

IV.

Conclusions

The Virginia Alcoholic Beverage Control Department can provide services and benefits to the State's military establishments that probably are not available from other sources. In addition, it is felt the working relationships established upon acceptance of this proposal should be mutually beneficial to all participants.

It is hoped, therefore, this preliminary proposal will be favorably accepted. Then, the necessary detailed study of the military needs can be started immediately so a final proposal can be prepared.